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No. CXXVII

Introduction to  
**VYAVAHĀRAKĀṆḌA**  
of  
**KṚTYAKALPATARU**  
( with Index )

INTRODUCTION TO  
VYAVAHĀRAKĀṆDA  
OF  
KṚTYAKALPATARU  
( with index )  
OF  
LAKṢMĪDHARA

BY  
K. V. RANGASWAMI AIYANGAR

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## PREFACE

The *Vyavahārikāṇḍa*, the twelfth Section of Lakṣmīdhara's *Kṛtyakalpataru* was published in 1953 as No. CXIX in the Gaekwad's Oriental Series. The learned editor, Principal K. V. Rangaswami Aiyangar, remarked in his Preface to that volume that 'an English Introduction giving a comparative examination of the views expounded in the Kāṇḍa, in relation to the literature to which it is a contribution, and an Index of half-verses would appear in a Supplementary Volume owing to the extraordinary bulk ( pp. 846 ) of the text of the *Vyavahārikāṇḍa*.

It now gives us great pleasure in publishing the promised Supplementary Volume as No. CXXVII in the GOS. It is hoped that the treatment of the subject by one who has devoted a major part of his life to a critical study of the Dharmaśāstra will be found most thoughtful and thought-provoking. Other parts of the *Kṛtyakalpataru* are under preparation and will be published without any delay. The active literary life of Principal Aiyangar even in his advancing age is very admirable.

Oriental Institute,  
Baroda.  
26-2-1958.

G. H. BHATT



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-

## CONTENTS

	Pages
List of Works Consulted .. .. .	..vii-xii
INTRODUCTION .. .. .	..I-I29
Contents of INTRODUCTION	
PART ONE : ADJECTIVE LAW ( <i>Vyavahāramātrkā</i> )	
Preliminary .. .. .	I
Definition of <i>Vyavahāra</i> .. .. .	I
The King as adminisitrator of justice .. .. .	2
Customary Law ( <i>Deśācārādi</i> ) .. .. .	3
<i>Prādvivāka</i> ( Chief Justice ) .. .. .	4
Other Members of the Court .. .. .	4
<i>Amicus Curiae</i> .. .. .	5
<i>Parīṣad</i> .. .. .	5
Kinds of Tribunals .. .. .	5
Gradation of Courts .. .. .	6
Four bases of <i>Vyavahāra</i> .. .. .	7
Rules of Trial ( <i>Vicāravidhiḥ</i> ) .. .. .	9
Steps in the Enquiry .. .. .	9
Demeanour of Parties in Court .. .. .	9
Judge's consideration for Plaintiff or Parties .. .. .	10
Commencement of the Suit .. .. .	10
Security for Appearance ( <i>Pratibhū</i> ) .. .. .	11
Arrest before Judgment. .. .. .	11
Plaint ( <i>Pakṣa, Bhāṣā, Pratijñā</i> ) .. .. .	11
Interdicted litigation .. .. .	12
Priority in dealing with cases .. .. .	12
Time for Defence or Answer ( <i>Uttaram</i> ) .. .. .	13
Answer or Defence ( <i>Uttaram</i> ) .. .. .	13
Representative or Agent of Defendant ( <i>Pratinidhi</i> ) .. .. .	13
Defeat in the Suit ( <i>Hīna</i> ) .. .. .	14
Compromise ( <i>sandhi</i> ) .. .. .	14
Court Fees ( <i>Bhṛti</i> ) .. .. .	15
Classes of Proof .. .. .	15
WITNESSES ( <i>Sākṣinaḥ</i> ) .. .. .	16
Indirect testimony .. .. .	17
Circumstantial Evidence ( <i>Yukti</i> ) .. .. .	17
Evidence on Commission .. .. .	18
Testimony of a solitary witness .. .. .	18

Disqualified witnesses ( <i>Asākṣiṇaḥ</i> )	..	..	..	18
Priority among witnesses : its determination	..	..	..	20
Rejection of Testimony or Witness	..	..	..	20
Examination of Witness ( <i>Sākṣiśrāvaṇam</i> )	..	..	..	20
Manner of Testifying	..	..	..	21
Evaluation of Witness	..	..	..	21
Allowabale Perjury	..	..	..	22
Strenth of Evidence ( <i>Sākṣibalatvam</i> )	..	..	..	22
Punishment for False Testimony	..	..	..	23
DOCUMENTS	..	..	..	23
Valid Documents ( <i>Sallekhya</i> )	..	..	..	24
Invalid Documents ( <i>Duṣṭalekhya</i> )	..	..	..	25
Testing genuiness of Documents..	..	..	..	25
Strength of a Document ( <i>Lekhyabalam</i> )	..	..	..	25
Importance of documentry proof	..	..	..	26
Punishment for forging documents	..	..	..	26
<i>Jayapatra</i> and <i>Paścātkāra</i>	..	..	..	26
POSSESSION	..	..	..	27
Prescriptive right in possession	..	..	..	28
Exceptions to Prescription	..	..	..	29
Determination of Interrupted Possession	..	..	..	29
REASON ( <i>Yukti</i> )	..	..	..	30
OATHS ( <i>Śapatha</i> )	..	..	..	31
ORDEALS ( <i>Divya</i> )	..	..	..	31
Application of Ordeals	..	..	..	32
Time for Application	..	..	..	32
Astrological time for Application	..	..	..	33
Procedure in Ordeal	..	..	..	33
1. Ordeal of the Balance ( <i>Dhaṭavidhiḥ</i> )	..	..	..	33
2. The Fire Ordeal	..	..	..	34
3. The Water Ordeal ( <i>Toyavidhiḥ</i> )	..	..	..	34
4. Ordeal of Poison ( <i>Viśavidhiḥ</i> )	..	..	..	34
5. Ordeal of Libation ( <i>Kośavidhiḥ</i> )	..	..	..	34
6. Ordeal of Grain ( <i>Taṇḍulavidhiḥ</i> )	..	..	..	35
7. Ordeal of the hot piece of Gold ( <i>Taptamāṣaka-vidhiḥ</i> )	..	..	..	35
8. Ordeal of Dharma ( <i>Dharmaja-vidhiḥ</i> )	..	..	..	36
Other Ordeals..	..	..	..	36
MANNER OF DICISION ( <i>Nirṇayaprakāra</i> )	..	..	..	36
Relative force of different means of decision	..	..	..	37
Action following Decision ( <i>Nirṇītakṛtya</i> )	..	..	..	37
Acknowledgment of success	..	..	..	38



APPEALS	..	..	..	..	..	..	38
VOID ACTS	..	..	..	..	..	..	38
LEGAL INDEPENDENCE	..	..	..	..	..	..	39

## PART TWO : SUBSTANTIVE LAW

### *Vyavahārapada*

Vyavahārapadāḥ—Heads of <i>Vyavahāra</i>	..	..	..	..	40
I LAW OF DEBT ( <i>Ṛṇādāna</i> )	..	..	..	..	41
Rate of Interest ( <i>Vṛddhi</i> )	..	..	..	..	41
Kinds of Interest	..	..	..	..	42
Special cases	..	..	..	..	42
Cases in which Interest is not due ( <i>Vṛddhi-niṣedha</i> )..	..	..	..	..	43
Pledges ( <i>Ādhi</i> )..	..	..	..	..	43
Law of Surety ( <i>Pratibhūvidhiḥ</i> )	..	..	..	..	44
Who cannot be a surety..	..	..	..	..	44
Repayment of debt ( <i>ṛṇādāna</i> )	..	..	..	..	45
Ways of recovering debts ( <i>Ṛṇodgrāhaṇavidhiḥ</i> )	..	..	..	..	47
III LAW OF DEPOSITS ( <i>Nikṣepa</i> )	..	..	..	..	48
IV SALE WITHOUT OWNERSHIP ( <i>Asvāmivikrayaḥ</i> )..	..	..	..	..	50
V LAW OF JOINT CONCERNS ( <i>Sambhūya-Samutthānam</i> )	..	..	..	..	51
Sacrificial priests	..	..	..	..	51
Joint concerns in Business	..	..	..	..	53
Joint undertakings among Artisans Artists	..	..	..	..	53
Joint undertakings in Agriculture	..	..	..	..	53
VI RESCISSION OF GIFTS ( <i>Dattāpadānikam</i> )	..	..	..	..	54
What should not be given ( <i>Adeya</i> )	..	..	..	..	54
Giving a son in Adoption	..	..	..	..	54
VII LAW RELATING TO WAGES ( <i>Bhṛtividhiḥ</i> )	..	..	..	..	55
Slaves—Classification :	..	..	..	..	57
Emancipation from slavery	..	..	..	..	57
Non-payment of Wages ( <i>Vetanasyānapākriyā</i> )	..	..	..	..	58
Law relating to Prostitutes ( <i>Panyastrīvidhiḥ</i> )	..	..	..	..	59
Payment of House ( by analogy to wages )—( <i>Grahādibhāṭaka</i> )	..	..	..	..	60
Owner and keeper of cattle—Disputes between	..	..	..	..	60
VIII TRANSGRESSION OF AGREEMENTS ( <i>Samvidvyatikramaḥ</i> )	..	..	..	..	61
IX REPENTENCE OF PURCHASE AND SALE ( <i>Vikrīyāsam- pradānam</i> )	..	..	..	..	63
( A ) Non-delivery goods sold	..	..	..	..	64
( B ) Repentence of Purchase ( <i>Kritvānuśayaḥ</i> )	..	..	..	..	64
X BOUNDARY DISPUTES ( <i>Śīmāvivādāḥ</i> )	..	..	..	..	64
Decision by evidence of witnesses	..	..	..	..	66

	Extension of the principle ( <i>atideśa</i> )—Encroachments, insani-		
	tarry acts .. .. .	66	
	Dykes ( <i>Setu</i> ).. .. .	67	
	Protection of Crops ( <i>sasyarakṣā</i> ) .. .. .	68	
	Punishment for destroying crops ( <i>sasyaghāta-danḍaḥ</i> ) .. .. .	68	
	Immunity from Punishment in such cases .. .. .	69	
XI	LAW OF CRIMES ( <i>Sāhasa</i> )—General .. .. .	69	
	(A) ABUSE AND DEFAMATION ( <i>Vākṣpāruṣya</i> ).. .. .	69	
	(B) ASSAULT ( <i>Danḍapāruṣya</i> ) .. .. .	71	
	Discipline and Assault .. .. .	72	
	Investigation of Assaults.. .. .	72	
	Cruelty to Animals .. .. .	72	
	Protection of Trees .. .. .	73	
	(C) THEFT ( <i>Steṇa</i> ) .. .. .	73	
	Royal responsibility for prevention of theft .. .. .	74	
	Search for thieves ( <i>corānveśanam</i> ).. .. .	75	
	Harbouring thieves .. .. .	75	
	Culpability according to <i>varṇa</i> .. .. .	76	
	Punishment of Thieves .. .. .	77	
	Penalties for ' manifest theft ' ( <i>prakāśa taskara</i> ) .. .. .	77	
	(D) VIOLENCE ( <i>Sāhasa</i> ) .. .. .	77	
	Crimes of Violence .. .. .	77	
	Extension of <i>Sāhasa</i> idea.. .. .	79	
	Detection of grave crimes.. .. .	80	
	(E) ABDUCTION OF WOMEN ( <i>Strisamgrahaṇam</i> ) .. .. .	80	
	Kinds of Adultery .. .. .	80	
	Penalties for it .. .. .	81	
	Pollution of Virgins ( <i>Kanyādūṣanam</i> ) .. .. .	82	
	Un-natural offences .. .. .	82	
	Intercourse with harlots ( <i>Bandhakyabhigamanam</i> ) .. .. .	82	
XII	RELATIONS OF HUSBAND AND WIFE ( <i>Strīpūmyogaḥ</i> ) .. .. .	83	
	Duties of married pair .. .. .	83	
	Dependence of Woman.. .. .	84	
	Means of safeguarding a woman's morals ( <i>rakṣāvidhiḥ</i> ) .. .. .	84	
	Rules for good wives .. .. .	86	
	Sati and <i>sahamarāṇa</i> .. .. .	86	
	Levirate ( <i>Niyoga</i> ) .. .. .	87	
	Women who have been used ( <i>Parapūrvāḥ</i> ) .. .. .	87	
XIII	DĀYA BHĀGAḤ ( Partition and Inheritance ) .. .. .	88	
	Definition of <i>Dāya</i> .. .. .	88	
	Time for Partition .. .. .	88	

Minority .. .. .	90
Preferential Share ( <i>Uddhāra</i> ) .. .. .	91
Partition among sons of different mothers .. .. .	92
Persons disqualified to inherit ( <i>Vibhāṅānarhāḥ</i> ) .. .. .	93
Performance of Sacramental rites ( <i>asamskr̥ta-samskaraṇam</i> )	94
What is divisible ( <i>Vibhājyam</i> ) .. .. .	95
What cannot be divided ( <i>a-vibhājyam</i> ) .. .. .	95
STRĪDHANA ( Wife's separate property ) .. .. .	97
Use of <i>Strīdhana</i> ( <i>strīdhanakṛtyam</i> ) .. .. .	97
Division of <i>Strīdhana</i> .. .. .	98
Succession to a childless Woman's property .. .. .	99
Mistakes of Partition ( <i>Avalupta-vibhāgaḥ</i> ) .. .. .	100
Division of property between sons born of mothers of different <i>varṇas</i> ( <i>Nānā-varṇa-samavāya-vibhāgaḥ</i> ) .. .. .	100
Share of son born after partition ( <i>Vibhaktaja-vibhāgaḥ</i> ) .. .. .	101
Revision of Partition ( <i>Vibhatāgata-Vibhāgaḥ</i> ) .. .. .	101
SONS, CLASSES OF ( <i>Putralakṣaṇam</i> ) .. .. .	102
THE ADOPTED SON ( <i>DATTAKAḤ</i> ) .. .. .	105
Filial Relationship ( <i>putratva-vicāraḥ</i> ) .. .. .	107
Extension of "sonship" ( <i>Putrātideṣaḥ</i> ); etymology of <i>putra</i>	108
The Despised Son ( <i>Ninditaḥ</i> ) .. .. .	109
Division of the property of a sonless man ( <i>sapinda sakulya</i> )	109
Responsibility for funeral offerings .. .. .	112
Partition after Re-union ( <i>Samsr̥ṣṭi-vibhāgaḥ</i> ) .. .. .	113
Proof of Partition ( <i>Vibhāga-niścaya</i> ) .. .. .	114
XIV GAMBLING AND BETTING ( <i>DYŪTA-SAMĀHVAYA</i> ) .. .. .	115
XV RELATIVE VALIDITY OF TRANSACTIONS ( <i>kriyābhedaḥ</i> )	116
XVI PRAKĪRṆAKAM ( Miscellaneous ) .. .. .	116
Maintenance of <i>Varṇāśrama</i> .. .. .	117
Rules of Punishment .. .. .	118
Exposition of the principles of Punishment .. .. .	120
Gradation of Fines .. .. .	121
Immunities .. .. .	122
Mitigation of punishment .. .. .	123
Tolls and Ferry dues ( <i>Taraśulka</i> ) .. .. .	123
Treasure Trove ( <i>Nidhi</i> ) .. .. .	124
Mines ( <i>Ākara</i> ) .. .. .	124
Group Names .. .. .	125
Standards of Measures and Money .. .. .	125
Mixture of <i>Varṇas</i> ( <i>Varṇasamkramaḥ</i> ) .. .. .	126
Anuloma and Pratiloma .. .. .	126
Rise and fall in Caste status <i>Jātyulkṛṣṭa</i> and <i>Apakṛṣṭa</i> ) .. .. .	128
Conclusion .. .. .	129
INDEX OF HALF-VERSES .. .. .	1-108

## OM ŚRĪYAI NAMAḤ INTRODUCTION

### *Preliminary*

Lakṣmīdhara devotes the twelfth section (*kāṇḍa*) of his digest (*nibandha*) to an exposition of legal procedure and civil and criminal law. These are all based ultimately on Dharma, whose nature and sources have been dealt with in the first *kāṇḍa*. The section which immediately precedes that on *Vyavahāra* is that on *Rājadharmā*. Both are oriented to the four-fold aims of existence and the ways of securing them. These are dealt with in the first nine sections of the Digest, and are summed up in the last section which deals with emancipation (*Mokṣa*). In the *Rājadharmakāṇḍa* (p. 154), Lakṣmīdhara cites two verses as from Nārada<sup>1</sup> to show that vital features of regal duty can be summed up as constant attention and help to good men, and the restraint of bad men, and that they may be further regarded as protection (in the widest sense) of subjects (*prajāraṁbhā*), subordination or submission to the aged and wise, seeing to the settlement of disputes between men (*darśanam vyavahārāṇām*) and protecting himself, *i. e.* as the embodiment of the State. The elaboration of the last two, among these duties, will show how *Vyavahārakāṇḍa* is the natural supplement of that on *Rājadharmā*.

### *Definition of Vyavahāra*

*Vyavahāra* is used in different senses. In popular usage, it means only a transaction or proceeding. It denotes also a law-suit or a dispute which is taken before a court of law for settlement. *Vyavahāra* is sometimes used in the restricted sense of legal procedure. Thus, Caṇḍeśvara deals with only legal procedure in *Vyavahāra-ratnākara* and so does Vācaspatimiśra in his *Vyavahāra-cintāmaṇi*. Both use the word *vivāda* (ordinarily used in the sense of a dispute or a law suit) in place of *vyavahāra*. Jīmūtavāhana in his classical treatise on judicial procedure (ed. Sir A. Mookerjee, 1912) avoids ambiguity by using the expression *Vyavahāramātṛkā* as the title of his book. Most treatises on *Vyavahāra* deal, as is done by Lakṣmīdhara, with both procedure and substantive law, *e. g.* Varadarāja's *Vyavahāranirṇaya* and Nīlakaṇṭha's *Vyavahāramayūkha*.

Lakṣmīdhara uses the word *vyavahāra* in the wider sense. He defines *vyavahāra* (p. 8) as the subject of a dispute between a plaintiff and a defendant

<sup>1</sup> The first of the two verses is found in the printed *Nārada-smṛti* (ed. Jolly), XVII, 17. The second verse is found in the printed text, p. 220 (XVII, 33) with *dharma* in place of *vṛtti*. The two do not run continuously.

in a court of law ( *arthī-pratyarthinor vivāda-viṣayaḥ* ). He cites ( p. 40 ) the well-known etymology of the term by Kātyāyana as a proceeding that removes ( *hāra* ) various ( *vi* ) doubts ( *ava* ) in a court of law. The verse that precedes the one in which the etymology is given has been variously explained by digests, and illustrated by examples.<sup>1</sup> A legal position ( *dharmākhyā* ) has to be established by effort, as by the production of evidence, as in the case of a landed estate in which there has been an interruption of occupancy ( *bhoga* ) which is taken before a tribunal. Vijñāneśvara ( II, 1 ) defines *Vyavahāra* as the assertion of one's rights as against the opposition of another ( *anyavirodhena ātma-sambandhitayā kathanam vyavahāraḥ* ). Lakṣmīdhara, in explaining " *vyavahāra* " in a *sūtra* of Gautama, defines it as that which helps to establish a final decision ( *vyavasthā-sāadhanam* ), and brings under it the sources of Dharma, like the Vedas and their Aṅgas, the Upavedas, Purāṇas, Dharmasāstra and Arthasāstra. Buhler, on the other hand, translates *vyavahāra* in the *sūtra* of Gautama ( XI, 21 ) as " administration of justice. " ( *infra*, p. 12 ).

#### *The King as Administrator of Justice*

As the adjudication of disputes and the administration of justice generally, including the punishment of persons guilty of crimes, constitute regal ( or State ) responsibility, Manu's description of how the King should begin to function in this way is cited, to begin with, by Lakṣmīdhara ( p. 7 ). The king is the fountain of justice. To fulfil this duty, he has to enter the hall of justice daily, on the second eighth part of the day, *i. e.* between 7-20 and 9 in the forenoon to look into disputes. He may remain in court till noon. He should be accompanied by Brāhmanaṣas, along with ministers. That this was not a mere ideal but was actually practised by even powerful rulers is shown by the testimony of Megasthenes ( Frag. XXVII. ) who states that " the king ( *i. e.* Candragupta Maurya ) remains the whole day in court, without allowing the business to be interrupted. " Kautilya rules that when in court, the king should be easily accessible to litigants and he should not allow them to wait long. ( *Arthasāstra*, I, 19 ). The court of justice has been described as *dharmasthāna*, *dharmāsana* ( Manu, VII, 23 ) and *dharmādhikaraṇa* ( Kātyāyana, verse 52 ). Kālidāsa and Bhavabhūti use the term *dharmāsana* to describe a court of justice.

The King must enter the Court of Justice, accompanied by learned Brāhmanaṣas, who are ' skilled in doing things that are appropriate to place and time ' ( p. 8 ) and by able ministers, and he must do so in a humble way ( *vinītaḥ* ), obviously as a mark of his feeling of heavy responsibility. He should not cause fear or embarrassment to suitors by appearing in regal splendour. He should daily administer justice according to the dicta of *śāstra* and custom. He

<sup>1</sup> See *Kātyāyanasmṛti*, Eng. Trans. by P. V. Kane, 1933, p. 122

should begin his work as judge after worshipping the guardians of the quarters (*lokapālāḥ*). The king should control himself and not show anger (*Yājñavalkya*, II, 1), nor be covetous (*lobhavivarjitaḥ*) i. e. have any personal interest in the suit before him. His advisers should be experts in Dharmaśāstra and Arthaśāstra. Dharma resides in good men, and the source of Dharma, in administration, is the King acting as a judge (p. 10). He should, as far as possible, in the many calls on his attention, administer justice in person and impartially (*a-pakṣāntara*, p. 11). His ideal should be Yama, the Judge of the Dead (p. 11). A wrong decision of a previous ruler should not be treated a precedent (p. 11). When *smṛti* rules seem to be in conflict, he should follow that rule which seems most reasonable (*yuktiyukta*) and equitable (*nyāyya*). If there is a conflict between a rule of Dharmaśāstra and a precept of Arthaśāstra, the former should prevail. Enjoyment without interruption of a property for three generations is held by some *Smṛtis* to be a source of ownership, but if it is *strīdhana*, he who enjoys it is to be punished as a thief (p. 14) and prescription will not apply. It is so also with regard to the king's property, (*Nārada*, II, 75). The king should try to trace truth in conflicting depositions, as a hunter can trace animals by their hoof marks (p. 15). Skilled liars may speak falsehoods that seem to be truths. The king should show skill in unravelling falsehoods and discovering truth. A king who shows such skill as a judge wins this world and the next (p. 17). The king who does not attend to suits, thinking only of his comfort will be "burnt" (in after-life). The king, as judge, should not overlook a clear rule, and decide by mere fiat, as such a course will mean ruin to him (p. 18).

#### *Customary Laws (Deśācārādi)*

The principle to be followed in regard to customs and usages is laid down by Gautama (XI, 20.21): they should not be opposed to sacred texts. With this provision, cultivators, tradesmen, herdsmen, artisans and money-lenders can make rules to be followed by their respective classes. Family customs, caste usages etc. should not run against Śāstra, and if they do so, they will be invalid (p. 20). Even in the case of the usages of *pratiloma* born castes, their validity will be upheld unless they are contrary to śāstras. To ignore such customary law will cause discontent (*prajāḥ prakṣubhyate*, p. 20). As illustrations, we have Bṛhaspati's rule that among the people of the south (*dākṣiṇātya*) cousin marriages, the eating of beef by artisans in Madhyadeśa, and of fish in the Eastern regions, etc. are to be allowed for the parties following them, and they are not to be called on to perform expiatory rites. Lakṣmīdhara cites Gautama's rule that those who follow such practices have authority to do so, so long as they are not in conflict with sacred precepts (*āmnāyair aviruddhāḥ pramāṇam*, p. 19). The king should give a decision in matters of such usages,

after having learnt them from those in each class or tribe or group who have authority to speak of them ( p. 19 ). Bṛhaspati's dictum that in cases where a rule is violated or what is forbidden is done, the king should take over the properties of the persons who do so, leaving them only bare means of subsistence and clothing, is explained by Lakṣmīdhara as not applicable to cases where local practices (*deśācāra*) permit them. The conventional practices of communities should be ascertained carefully, recorded and authenticated by the royal seal, so that they may be applied in cases concerning such conventions ( p. 23 ). The practices are valid only in the areas in which they are followed and among those who follow them. The subject has been dealt with fully in *Gṛhasṭhakāṇḍa*, Introduction, pp. 22-24, and the corresponding portions of the Text.

#### *Prāḍvivāka* (Chief Justice)

If the king is unable, through pressure of other duties (*kāryāvasāt*) is unable to preside himself over a trial in court, he can delegate his duties to a *prāḍvivāka*, who will be the Chief Justice. The person chosen for the office must be a Brāhmaṇa, who has mastered the śāstras (*śāstrapārāga*). He should be well-born, mentally active and vigilant, impartial, incorruptible, of suave manners, good tempered, hard working and a believer in after-life (*Kātyāyana*, p. 25). The *Prāḍvivāka*, according to Bṛhaspati ( p. 25 ) is so called because it is his function to interrogate the parties (*prcchati*) and he speaks sweetly to the parties. Truthfulness is among virtues the highest to be looked for in a *Prāḍvivāka* rules (Gautama, XIII, 31). Some smṛtis hold that when the king is himself presiding over the court of justice, he must have the chief justice (*prāḍvivāka*) to advise him, but the chief justice exercises in such a case only an advisory function. The chief justice should under no circumstance hold private talks with the parties to the suit—a rule which applies also to the assessors or puisne judges (*sabhyāḥ*) who should also be appointed to assist the chief justice. The number of the *sabhyas* is fixed by Manu at three as a minimum, but according to Bṛhaspati they may be five or even seven. Like the chief judge the *sabhyas* should be appointed by the king, and in qualities that they must possess they must be like the chief judge. But while the *prāḍvivāka* must be a Brāhmaṇa, the assessors can be Kṣatriyas or Vaiśyas, *if Brāhmaṇas are unavailable*, but they must possess the requisite qualifications. According to Viśvarūpa the functions of the assessors are only advisory and not administrative (II. 4). Justice is administered only by the king and in his absence by the chief judge.

#### *Other Members of the Court*

Without exercising judicial or administrative functions, certain others are required to be appointed in every court of justice. These are the herald who announces the decisions in the suits and proclaims its terms, the Accountant

(*ganaka*) who has to compute the exact amount of the claims, the Clerk of the Court (*Lekhaka*) who should write down the statements, and judgments that are delivered, and the Bailiff or *Sādhyapāla*; who should be a *Śūdra*, who has to serve the summons, and watch the parties and witnesses. Water should be kept in the court room for refreshment of parties and witnesses under examination, and fire and gold to be used, if necessary when ordeals are imposed.

#### *Amicus Curiae*

The chief judge and the puisne judges (*sabhyas*) are appointed to constitute the court. But learned *Brāhmaṇas* accompany the king into court, and though not appointed (*aniyukta*) they may be asked to give their opinions to the king or the judges on difficult problems of law that may arise during a trial. Such persons merely express opinions when asked to do so. Their duty ends there. Persons present in court who offer opinions and intervene in trials, without permission are punishable. Trials must be in open court. The private individual who offers his view, whether appointed to give it (*niyukta*) or volunteers it (*aniyukta*) must speak impartially (*Nārada*, p. 33). The members of the bench should speak what is right and decide justly, whether the king will follow their verdict or not (*Kātyāyana*, p. 34).

*Smṛtis* are full of admonitions to judges and to those who take part in trials to be just and impartial and avoid corrupt practices, by holding before them not only immediate punishment for bribery, but a bad future after death. The *sabhya* who sits silent in court, without expressing his views when wrong things are about to be done, must be held to share in the wrong. (p. 37). The *sabhya* should express his opinion only after careful consideration of the matter in dispute and under trial; he is liable for punishment otherwise, both in this world and in the next. An unjust judge must be exiled (*nirvāsyah*, p. 39). A judge who takes sides will have his whole property confiscated. (*Viṣṇu*, p. 39) Similarly a judge who does not take trouble to apply his mind critically to a case and errs through it is also punishable (*Bṛhaspati*. 1,76).

#### *Pariṣad*

When cases involving business transactions come up, the king (or chief judge) can convene assemblies (*pariṣad*) of merchants or business men of good families and standing, and of mature age to watch the proceedings and advise, when so asked. (*Kātyāyana*, 58-59). Association in trials of experts was common. Thus in *Mṛcchakaṭika* a chief merchant (*pura-śreṣṭhin*) and a member of the *kāyastha* caste (the *Śreṣṭhin's* Secretary) are associated with the judge in the trial of *Cārudatta*.

#### *Kinds of Tribunals*

According to *Bṛhaspati* courts of justice are of four kinds: an established



court (*pratiṣṭhītā*), in a fixed place or town, a circuit court ("moving", *apraṭiṣṭhītā*), a court constituted under royal warrant whose chief judge can use the royal seal (*mudritā*) and the court over which the king himself presides (*śāsilā*). The Court of Justice over which the king or *prāḍvivāka* presides should be in the fort within the capital (see *Rājadharmakāṇḍa*. p. 42). The Court sits on all days except the eighth, fourteenth and fifteenth *tithis*. Great stress is laid on employment of elderly persons as judges, assessors and as *amicus curiae* (p. 38), apparently to ensure learning, experience and sobriety of view.

#### *Gradation of Courts*

The chief court is the one on which the king or chief justice presides. But Nārada and Yājñavalkya (1,30) declare that suits may be tried in village courts (*kulāni*) courts of corporations (*śreṇi*) assemblages of people (*gaṇa*, *pūga*). The first three must have been like the later *pañcāyat* courts. The terms have been interpreted in different ways so as to bring almost all types of groups under one or other of them (See Medhātithi on Manu, VIII, 2). Kautilya makes a distinction between ordinary civil law courts, under which the various divisions named above will come, and criminal courts, styled *kaṇṭakaśodhana*, "means of removing thorns," i. e. troubles to people in the way of crimes. In Dharmaśāstra the imposition of penalties for crimes is a function of the king. While the ordinary rule in civil cases is that the king should not initiate proceedings in court (Manu, VIII, 43), it is restricted to civil proceedings generally, and in the case of crimes the king *can* and *must* take the initiative (Aparārka, p. 605) The *Kauṭīliya* mentions two types of Courts: *Dharmasthīya* and *Kaṇṭakaśodhana*. Five out of the eighteen titles of law (*vivādapadas*) deal with criminal offences and trials under them must come before separate courts, and ultimately to the king for award or confirmation of sentences. The king has both police and magisterial duties. He uses either the ordinary police or secret service agents, (*stobhaka* or private detective or *sūcaka* or C. I. D. agent).

The judicial tribunals mentioned in *smṛtis* were thus of a representative character for most local cases. They included among judges not only persons learned in "law" (*smṛti*) but also persons having local, communal or professional knowledge and experience. The courts had thus an elasticity wanting in modern courts (Gururaja Rao, *Ancient Hindu Judicature*, p. 15). No trials are by a single judge; even the king is assisted. A very high moral and legal responsibility is laid on all who try cases or help in them, and heavy punishments both secular and spiritual are indicated for those who error.

#### *The Four Bases of Vyavahāra*

On p. 41 occurs a citation of two verses of Nārada, which have caused a considerable amount of confusion in treatises on Hindu Law and Polity. The

two verses translated without bringing in preconceived ideas of royal power into it will run thus: "The four "feet" (*catuṣpāda*) of a *vyavahāra* (a case before the court) are *Dharma*, *Vyavahāra*, *Caritra* and *Rājaśāsana*, and among these each succeeding overrides those preceding. There, *Dharma* rests on Truth (*satya*), *Vyavahāra* on evidence (*sākṣiṣu*), *Caritra* (Custom) on records in book form, and *Rājaśāsana* on an order of the King." The same verses, with slight variation occur in Kauṭilya's *Arthaśāstra*, p. 150. Under this dictum, *Rājaśāsana*, if interpreted as it has been by some modern writers (like Dr. Jayswal,<sup>1</sup> and Dr. Shama Sastri) as royal edict, it will imply that by fiat a king can over-rule customary usages, as well as *Dharma*, and that Nārada exalts the power of the king to absolutism. Dr. J. Jolly loosely translated the verses thus: "Virtue (*Dharma*) a judicial proceeding, documentary evidence and an edict from the king are the four feet of a lawsuit. There virtue is based on truth; a judicial proceeding (rests) on witnesses; documentary evidence (rests) on declarations reduced to writing; an edict (depends) on the pleasure of the king." (S. B. E., Vol. 33, p. 7). This loose translation has been outdone by Dr. Shama Sastri's version (*Arthaśāstra*, Eng. Trn. 1929, p. 170):—"Sacred law (*dharma*), evidence (*vyavahāra*), history (*caritra*) and the edicts of kings (*rājaśāsana*) are the four legs of Law. Of these four in order, the later is superior to the one previously named." It has already been noted that customs which contravene *smṛti* are invalid; and *caritra*, custom, as recorded by order of the king in books were like Sir Charles Tupper's *Punjab Customary Law* (1881) and R. A. Steele's *Law and Custom of the Hindu Castes in the Southern Maharatta Country*.

How greatly the translators have departed from accuracy will be seen if the terms are translated and interpreted correctly in accordance with the next verse and legal usage. The word *vyavahāra* (or *vivādārtha* to use the variant reading) only means "the subject matter of a suit". Its validity will thus depend, according to *Dharmaśāstra*, in the *descending* order on the king's (*i.e.* the court's) order (*rājaśāsanam*, as the king was also the chief judge), customary law, as recorded in books, (*caritram pustakaraṇam*), the matter under trial (*vyavahāra*) as deposed by witnesses (*vyavahāraśca sākṣiṣu*) and *Dharma*, which is rooted in Truth (*satyasthito dharmaḥ*). In the view of those who have seen in these verses proof of regal absolutism, and power to legislate, like the Tudor Kings, by proclamation, the king can make or unmake laws by mere fiat, even if they contravene morality, religion and the ideals of life." A claim for absolute authority can go no further. Those who have given this interpretation overlook the fact that the very same authorities they rely on (*e.g.* Kauṭilya and Nārada) have declared unequivocally that where there is an

<sup>1</sup> *Manu and Yājñavalkya*, p. 74.

apparent discord between *Dharma* and *Nyāya* (Logic, reason) the latter must give way, and Kauṭilya's emphatic adjuration to the king to act in strict accord with *Dharma* (*yasmin arthe virudhyeta dharmenārtham viniścayet*, p. 150). The king is the mainstay of *Dharma*, and the means of its diffusion (*rājā dharmappravartakaḥ*, p. 150) by maintaining the enjoined duties of the four *varṇas* (*cāturvarṇāśramasya ācārarakṣaṇāt*). *Dharma* is of Divine origin, and it cannot be inequitable or illogical, and the injunction of Kauṭilya to apply logic and equity (*nyāya*) and of Bṛhaspati to apply intelligence (*yukti*) in interpretation of *Dharma*, which being Divine is infallible, are based on this hypothesis. The laws (*Dharmo rājakṛtaśca*) which has to be maintained by the King, according to Yājñavalkya (II, 186) must be such as are not in conflict with "true *Dharma*" (*nijadharmāvirodha*). The dictum of Manu (VII, 13) that orders that the king may pass occasionally to suit the moment, but without infringing true *Dharma* must be enforced is thus illustrated by Medhātithi: If the king orders that during the celebration of a marriage in the house of a minister or royal favourite (*iṣṭa*) the city should observe a festival, that all must appear on the occasion, or that no animals should be killed or birds snared on certain days, or that creditors should not arrest and detain debtors on certain days, his orders should be obeyed. It is noteworthy that such are the kinds of laws made by Aśoka, as evidenced by his Edicts. The injunction to the people to obey these orders is itself evidence of the king's authority and attitude to *Dharma* being under public scrutiny.

The verses in question have been interpreted by the *Smticandrikā* (*Vyavahārakāṇḍa*, ed. Mysore, pp. 23-24) thus. A *kṣatriya* has contacted the queen secretly, and when caught, he denies the offence through fear of death sentence and the witnesses he cites perjure themselves to save his life. Here there is a conflict of *Dharma* and *Vyavahāra* (resting on the evidence of witnesses). Again an *ābhira*—(shepherd tribe) accuses a man of adultery with his wife, but by the recorded custom of *Ābhīras'* adultery by its women is no crime, and he defends himself by referring to his custom; here *caritra* (custom) overrules both *vyavahāra* (evidence in court) and *Dharma*. By an administrative order the King directs the house of a *Brāhmaṇa*, which is inviolable in Law, to be entered by his police in search of a criminal; here the king's order over-rides *Dharma*.

*Mādhavācārya* (*Parāśara-Mādhaviya*, ed. Islampurkar, III, pp. 18-19) gives another illustration to explain the rule. By the custom of Malabar adultery is no offence, while in ordinary law it is. A person caught in adultery with a Malabar woman pleads the custom in defence and is acquitted, in spite of evidence (*vyavahāraśca sākṣīṣu*); but if the king had ordered that in spite of the custom no adultery should be tolerated with Malabar women, his *śāsanam*

must be upheld and the offender punished. It is to enable local or communal usages to be explained, even when recorded, that local assessors are brought in trials before the Courts.

*Rājaśāsanam* may be translated as a decision of the king in a matter in dispute in which local usages and *smṛti* rules are cited on opposite sides and seem balanced ; if, in such a case the king gives a decision, that will be the rule for the future in similar cases ( *Parāśara-Mādhaviya*, III, p. 180 ). When there are no witnesses or documents, nor possession, and no scope for an ordeal, and there are no texts on local usage, the King must decide and his decision ( *śāsanam* ) will become binding in this case and similar ones in future.<sup>1</sup>

#### *Rules for the Trial ( Vicāravidhiḥ )*

The Court should be located in a well-built house within the Fort, well supplied with water and shady trees. Its hall must have images or pictures of gods ( *pratyālekhyadevatāḥ* ) : It should have water for refreshment of parties and a fire for use in ordeals. If the day is divided into eight parts, the time for the Court beginning is work in the second eighth *i. e.* from 7-30 A.M. The court may go on till noon.

#### *Steps in Enquiry*

The four steps in the enquiry are: the plaint ( *pūrvapakṣa* ); the defendant's reply ( *uttara* ); the Court's decision as to who should begin and on whom the burden of proof lies ( *pratyākālita* ); and evidence as proof ( *kriyāpāda* ). According to Nārada the first step is to record the plaint and the reply of the defendant ( *āgama* ) decide next the section of the law ( *vyavahārapāda* ) within which the matter will come, proceed with the investigation ( *cikitsā* ) and come to a decision ( *nirṇaya* ). If the statement in the plaint is denied as untrue ( *mithyokta* ), the enquiry has four stages. So also in case of a special plea admitting the charge but qualifying it with a counter-claim, in such a way as not to go against the defendant ( *pratyavaskandana* ), and citing a previous decision ( *prāñ-nyāya* ), but in case of the admission of the claim, it consists of only two stages ( Brhaspati, p. 45 ).

#### *Demeanour of Parties in Court .*

It is disrespect to the Court if the parties come into it with dis-shevelled hair ( *muktakeśi* ), disshevelled clothing ( *muktakaccha* ), without the sacred thread worn as it should be ( *anupavīta* ), or without the second cloth worn above the body ( *anuttariya* ), or sit down unpermitted by the Court, wear garlands, or hold up the left arm. These constitute discourtesy, or contempt of court.

<sup>1</sup> See my *Indian Cameralism*, 1949, pp. 103-110.

### *Judges' Consideration for Plaintiff or Parties*

It is natural for litigants, who have to resort to courts for the first time to feel shy, or embarrassed or even to lose their mental balance or temper, when questioned. If the judges resent manifestations of temper from parties, the case will be affected. Manu (VIII, 312) advises the king (as a judge) always to forgive litigants who inveigh against him. But, an enraged party in a suit may often blurt out the truth in anger, and the Clerk of the Court is therefore enjoined to record what an angry party utters in anger (p. 48).

### *Commencement of the Suit.*

When the party who wishes redress from Court comes into it in a humble manner, supplicating justice, the King (or Judge) should reassure him by asking: "What is your business? What is your grievance? Be not afraid! Speak out." (p. 47). He should also ask "By whom, in what way, when and for what reason were you injured?" (*ib.*). Whatever is given as a reply to these questions should be taken down in writing, after further questions and consideration along with the assessors, and the recorded statement should be attested by the seal of the King or Judge (p. 51). After making his complaint, the plaintiff should apply for some restraint to the defendant (to ensure his attendance when summoned later by the Court) but such restraint (*āsedha*) should not cause any physical injury to the person restrained (p. 52). The restraint applied (by the complainant or later by the Court) may be of four kinds:—compelling him not to leave a place (*sthānāsedha*), arrest for a short time (*kālakṛta*), inhibition from moving out (*pravāsa*) and restraint from activity of any kind till the debt is discharged (*karma*). But a plaintiff who places restraint on the other party without the sanction of the King (*i. e.* the Court) is punishable. The restraint is only pending the service of summons on the defendant. Arresting and detaining one who should not be is punishable. Restraint or arrest must not prevent the man so detained from exercising his limbs, or breathing freely or speaking. Restraint should not be applied in cases where it is impossible without injury to the person arrested (as one on horse-back or on an elephant), or where it will entail loss seriously, as arresting a cultivator when engaged in harvesting, or sowing, or a soldier on the march or in battle (*sankhye*) or a sacrificer during the sacrifice (p. 54). Similarly, one who is about to be married in accordance with sacred rites (*sāstrodvāhodyata*), one who has begun the rite of gifts (*dānodyata*), artisans at their work, one engaged in pursuing a vow (*vratin*), a minor (*aprāptavyavahāra*), a royal messenger (*dūta*), and persons tormented by severe illness or calamities, are not to be placed under restraint (*Nārada*, I, 52-54). When through an order of the Court, the defendant is made to stay in his own house, he should not be taken into custody on account of another suit (*Kātyāyana*, p. 55).

These are also not to be sued or summoned, ( *Vyāsa*, p. 55 ). Those who are construed as under the tutelage of their kinsmen, like a young woman in straits, or a woman recently confined, and maidens of a higher *varṇa* than the plaintiff, are not to be summoned. But in the case of women on whom the family depends, or who are without family, or are unchaste or of degraded condition, it is allowed ( Compare *Civil Procedure Code*, section 132 ). He who, when summoned, fails to appear will be fined according to the gravity of the suit.

#### *Security for Appearance (Pratibhū).*

In order to ensure the attendance of the plaintiff, after he has made his complaint and statement, and the defendant, after he has been summoned, sureties or security for attendance have to be furnished by them ( *Yājñavalkya*, II, 10 ). If a plaintiff, with an apparently good case, is not able to furnish the security for his appearance, he should be kept under watch in court, and the warders who keep watch over him should be remunerated by him at the end of the day ( p. 57 ). The servant of the Court who serves its summons ( *dūta* ), should be paid the cost of his food, sufficient for the guard. ( p. 57 ). A second summons should be served on a defendant in case the area he lives in is in the possession of an enemy, or is under famine, or is afflicted by epidemic ( *vyādhīpīḍita* ), and his failure to attend on the first summons must be excused ( p. 56 ). The surety is also for the purpose of ensuring that the decree of the Court is made effective. If either party is unable to afford a surety, he must remain in custody under a court official ( *sādhyapāla* ). No one is to be accepted as a surety whose antecedents and capacity to stand as such are not known to the Court, or one who may not be able to pay the amount decreed if the party proves unable to do so ( *Kātyāyana*, 114-116 ). *Kātyāyana* ( 120 ) provides for the appointment by the Court of a receiver, who will hand it over ultimately to the successful litigant.

#### *Arrest before Judgment*

The provisions about *āsedha* are analogous to those about arrest before judgment in Civil Procedure Code, Sec. 94. ( Order XXXVIII )

#### *Plaint ( Pakṣa, Bhāṣā, Pratijñā )*

When the defendant comes before the Court the statement originally made by the complainant ( plaintiff ) is written down accurately in their presence ( *Yajn.* II, 6 ). In the second recording all details must be brought in by the plaintiff. The plaintiff is also termed *arthin* ( one who prays to the court for help ) and *abhiyoktr* ( attacker ) as he attacks the defendant. The latter is termed *prativādin*, *pratyarthin* and *abhiyukta*. After the defendant comes into court, the plaintiff may alter or amend his original statement and finalise it. He can

amend his plaint till the reply of the defendant is filed (*Nārada*, II, 7). A plaint which omits essential details like dates, location and value of the object claimed and its dimensions is inadmissible (*Kāt.* 138). A plaint is vitiated by contradictory statements and will fail (*Brhaspati*, p. 61). If the plaintiff through timidity is unable to complete his case, he may be given time to do so (p. 62), and *Nārada* limits the time to a week. The plaintiff's statement should be written on a board or on paper. (The rules are similar to those of the Civil Procedure Code, Order VII, rules 1-5).

A plaint which omits to furnish essential details (e.g. time and place of cause of action, the material or *dravya* in dispute and its amount), and one which mixes up several *vyavahārapadas*, or contains manifestly imaginary claims, or is self-contradictory must fail, as also one opposed to the usages of the country (*Kāt.* 136). A plaint making a claim for a trifle is to be rejected, according to *Brhaspati*, as it will only waste the Court's time.

#### *Interdicted Litigation*

A case involving a dispute between a *guru* and his disciple, a father and his son or sons, between husband and wife (*dampatī*) and master and servant (*svāmi-bhṛtyaka*) should not be allowed. *Lakṣmīdhara* (p. 51) explains that after the judges (*sabhyāḥ*) obtain in such cases the plaintiff's statement and that of the defendant, and hear them, they should not proceed with the case but endeavour to clear up the matter and calm the disputants (p. 51). The *Mitākṣarā* (II, 32) takes a similar stand, holding that as no good will result in this world or the next by proceeding with such disputes, the pupils and others should be induced by the court to give up the case, but if the parties press the matter, the suit should be proceeded with and decided on its merits. *Jīmūta-vāhana* (*Vyavahāramātṛkā*, p. 285) takes a firmer stand. He states: "This refers only to small matters (*alpāparādhaviṣayam*). If the teacher inflicts an improper punishment (*anucitadāṇḍa*) on the pupil, or the father through infatuation wishes to give away his entire property (*sarvasva*) to a prostitute or a *kirāta*, or desires to sell away an only son or give him away (in adoption) or a husband wishes to sell away his chaste wife or a hereditary servitor—such disputes *must* be looked into (*dṛṣṭavya eva*), and the appropriate action or punishment awarded by the Court". He cites passages showing that the wife has absolute property over her *strīdhana* and if the wife or son errs they must be lightly punished. A legal proceeding by these is therefore lawful. *Nārada* holds that disputes between husband and wife should be settled by relations, and not by courts of law.

#### *Priority in dealing with Cases*

*Manu* (VIII, 24) lays down that suits are to be taken in the order of the *varṇa* of the complainants, the *Brāhmaṇa*'s being heard first, and so on. This is

merely recognition of the religious commitments of the Brāhmaṇa and of the others rather than partiality. Again, when suits of different importance are brought in, those which are most important should be taken up first, according to Medhātithi. Serious cases of violence, theft, assault and defamation and cases relating to women (‘against women’, according to Viśvarūpa) should be heard at once, and the defendant must be made to answer the charges immediately. ( Yājñavalkya, II, 12, p. 66 )

#### *Time for Defence or Answer ( Uttaram )*

When the value of the thing in dispute will deteriorate, or there will be the risk of its destruction or loss, the matter should be treated as urgent. Kātyāyana holds that in disputes concerning cattle, fields, women, marriage, deposit, loans (for use), purchase and sale, theft, quarrels (*pāruṣya*) acts of violence and charges of grave sins the defendant should be made to give his reply immediately. ( p. 67 ). Ordinarily, if the defendant does not give his rejoinder within a week, he loses the case ( Kātyāyana ), but Manu ( VIII, 58 ) allows 45 days for the rejoinder to be made. The time should be granted only when applied for (*yāceta*, p. 64 ). The time granted will depend ordinarily on the interval between the filing of the suit and the transaction, and the maximum time is one year ( p. 65 ), which can be given also when the defendant is an idiot, or lunatic or is seriously ill or has gone to a foreign land and his address is unknown, as are also relevant witnesses ( p. 66 ) Gautama. ( XIII, 28 ) states that if the defendant is unable to give an immediate reply, the judge may wait even for a year, but, as pointed out by Medhātithi, this is the extreme limit, and should not be ordinarily allowed. Postponement, at the discretion of the Court, may be granted in complicated cases. When such time is allowed in cases of debts, pledges, gifts, deposits and inheritance, due security must be obtained before time is given for the reply ( Pitāmaha in *Parāśara Mādhyāya* ).

#### *Answer or Defence ( Uttaram )*

A plaintiff's reply to the contention of a defendant is replication, and the defendant's reply to the plaintiff's replication is a ‘rejoinder’. According to Brhaspati ( p. 68 ) the reply is of four kinds : ( 1 ) denial (*mīthyā*) ; ( 2 ) admission (*satya* or *sampratipatti*) ; ( 3 ) counter-claim or special plea for demurer (*kāraṇa* or *pratyavaskandana*) ; or ( 4 ) plea of *res judicata* or former decision (*prāṇ-nyāya*). Lakṣmīdhara cites from Brhaspati, Kātyāyana and Vyāsa detailed descriptions of faults in a rejoinder ( pp. 68-74 ). The treatment is exhaustive. Everything is aimed at minimising delay in the disposal of the suit. This is a special merit of Hindu judicature.

#### *Representative or Agent of Defendant ( pratinidhi, prativādi )*

When a person is offered as his consenting representative by the defen-



dant, he should be treated as if he was the party, and be allowed to act for his principal, but the victory or defeat is the latter's and not that of the agent. But an agent will not be allowed in cases of brahmanicide, drinking wine, theft, incest and other grave offences like sedition, counterfeiting coins and violent assault ( p. 75 ). The agent is like a priest in a religious ceremony acting for a principal. The natural agents are brothers, father or son. The intervention of others than the constituted agent is punishable ( p. 75 ).

#### *Defeat in the Suit ( Hina ).*

Apart from the results of the investigation and trial, which have to be carried, a party may be regarded as defeated in certain circumstances. Thus, according to Manu ( VIII. 53-58 ), the plaintiff who cites a witness who was not present at the transaction, or who retracts the statement of his case, or makes confused and contradictory statements, or shifts his ground, or who does not stand by his own assertions, or who tampers with a witness, or refuses to answer questions put to him by the judge, and who does not establish his case, is to be regarded as ' defeated, ' ( *hina* ) i.e. as having lost his case. If a plaintiff refuses to answer questions put to him by the Court, he will be fined. The same is the case with a defendant also, but a limit of three weeks is allowed him to give his answer to the plaint. ( p. 82 ). Nārada regards the losers of a suit as of four kinds : those who abscond after being summoned by the Court, or who keep silent in Court, or who are convicted of falsehood in Court or one who admits the case against him ( i.e. confesses ). Nārada adds to the list of losers in a suit those who give up their original claims and put forward new ones, not mentioned in the original complaint ( p. 81 ). Yājñavalkya ( II, 16 ) adds to the number he who endeavours to press his claim without proof. Kātyāyana adds to the number the person who having made a charge backs out of it later ( p. 82 ). A verbal error ( *vākchala* ) does not vitiate an act, ( Nārada, p. 83 ), in matters relating to women, landed property, cows and debts. The error has to be paid for by a fine, but the suit will not be lost.

#### *Compromise ( Sandhi )*

After the defendant has filed his answer ( *uttaram* ) and the parties have joined issue in Court, they should not compromise the suit privately without the sanction of the Court. Such a compounding will be like the union of iron pieces by fusion. But it may be necessary if the evidence on both sides is balanced, and the uncertainty of the decision, owing to differences between usage and smṛti will make a compromise desirable. It is for the courts to encourage such compromises, says Bṛhaspati ( p. 85 ) as disputes engender hatred among men, and heads of society should endeavour to stifle such growth of illwill. The courts are advised to help the trend to compromise. But a compromise entered into behind the back of the Court is punishable, with double the court costs

on each side. In modern Indian Law too this position exists ( See *Civil Procedure Code*, sec. 445, Order XXIII, and *Criminal Procedure Code* on compounding of offences ). Both parties may have been wrong-doers and would not escape judicial castigation, if the suit was proceeded with. It is the idea that such moral restraint will be evaded that is behind the penalty advised for unauthorised compounding. Kātyāyana deems such arrangements as deceiving the King.

#### *Court Fees ( Bhṛti )*

In criminal cases no fees had to be paid by the complainant, and fines imposed are among the penalties on the convicted. No fees are to be paid at the inception of the suit by either party. When the suit is decided, each party has to pay 5% of the value of the suit, and the extra 5% to be paid by the unsuccessful defendant is the penalty for needless litigation, and has to be treated as a fine, if he had denied his liability and necessitated the enquiry in Court ( Manu, VIII, 139 ). Besides its lowness as compared with the heavy court fees, of a progressive nature, rising in amount with the value of the suit, its collection at the end of the suit makes it possible for a poor man who has no resources and has been deprived of them by his opponent, whom he has to sue, to start the suit. It is not so now. Taken along with the provision to prevent unnecessary delays in hearing the suits and deciding them, the old smṛti law was fairer to litigants than modern Indian law.

#### *Production of Evidence of Proof ( Kriyādānam )*

Even the plaintiff becomes a *replicatio* or rejoinder ( *uttaram* ) when the defendant raises in his reply a counter claim. In such a case, the plaintiff has to add proofs to establish his claim ( Kātyāyana ). The plaintiff must produce further evidence to support his claim, *e. g.* in a suit for the repayment of a debt, if the defendant while admitting puts forward a counter claim, by citing witnesses who were present when the loan was contracted. If two persons quarrel, and if both cite witnesses, the witnesses of the party who first goes to the Court shall be heard first. When the plaintiff's case shows weakness ( *ādharya* ), the witnesses of the defendant should be heard first. When the defendant has met the plaintiff by a counter claim, he takes priority and has to prove his assertion first. ( p. 88 ). If the reply is denial the burden of proof is on the plaintiff. If the reply claims to rest on a former judgment or on a special plea, the burden of proof lies on the defendant. If the reply admits the claim no question of burden of proof arises. When the defendant denies the claim *in toto*, and by evidence the plaintiff partly establishes it the judge can decree the whole claim.

#### *Classes of Proofs*

Bṛhaspati ( p. 91 ) classes them as two—human and divine. Human proofs

are witnesses (*sākṣinaḥ*), documents (*lekhyā*) and inference (*anumāna*), Kātyāyana adds *bhukti* or enjoyment or user as a fourth kind of proof. *Yukti* (reasoning) is used as a synonym for *anumāna*, as inference is by reasoning. In certain cases like a right of way, ownership of water courses, enjoyment is a more powerful proof than documents or witnesses. Ordeal is divine proof. Ordeals are recommended in the case of heinous offences (*sāhasa*) along with witnesses: so also in cases of abuse, defamation and injury. In cases of treason (*nṛpadroha*) ordeals are recommended in preference to evidence, as obviously it will be difficult to get the latter. So also in regard to cases involving the character of women (p. 95). In regard to acts done secretly, in which witnesses are obviously unavailable, ordeals are necessary. Secret offences may be dealt with by study of manifest signs and demeanour as well as by ordeals. In regard to acts done long ago, for which living testimony is unavailable, ordeals may be used in preference to witnesses. Even when witnesses are available, ordeals are preferred (1) when the evidence on both sides is equally balanced, making it difficult to decide, and (2) when the offence being investigated is one involving death penalty (p. 96). If the authenticity of a relevant document (*lekhyā*) is denied, recourse must be to ordeals. So also if the document is declared to be forged: (p. 97). Brhaspati and Kātyāyana favor a wider use of ordeals, as in cases of misappropriation, fabrication of pearls, gems and corals, withholding a deposit or adultery. The use of ordeals is prohibited in disputes relating to landed property and of libel and slander.

### *Witnesses (Sākṣinaḥ)*

Witnesses are grouped in eleven classes by Nārada and into twelve by Brhaspati. They are grouped as 'appointed' (*kṛta*) and 'unappointed' (*akṛta*). The former are of five kinds and the latter of six (Nārada). Under the first class come an attestor who is cited as witness (*likhita*), one who has to be reminded of the act (*smārita*), a casual witness (*yadyccchābhijñā*), a secret or hidden witness (*gūḍha*) and an 'indirect' witness (*uttarasākṣin*) and a family witness (*kulya*). Brhaspati adds to this category the person who caused the writing (*lekhitā*). Under the 'unappointed' category come co-villagers, the judge, the king, one acquainted with the affairs of both parties, one deputed by the claimant. When a trial is conducted by the king (as on an appeal) the scribe (clerk of the court), the judge and the puisne judges (*sabhyāḥ*) may be witnesses (p. 101). When a case of theft or assault within a village is being dealt with, a villager is a good witness, even if uncited. A person, not cited but who has actually heard or seen, is admissible as a witness (Manu, VIII, 76). The *uttarasākṣin*, who corroborates the testimony of others from his own knowledge, is hardly an indirect witness, according to Dr. Kane (*Vyavahāramayūkha*, Notes, p. 66). Jīmūtavāhana cites a verse of Vyāsa to show that as regards

what took place in his own presence as a judge, none can be a better witness than the king. Dr. Amareshwar Thakur (*Hindu Law of Evidence*, 1933, p. 20) points out that acceptance of *akṛta* witnesses is due to the necessity for testimony and some circumstantial guarantee of reliability.

The testimony of an attestor (*likhita*) is valid even after the lapse of time.) p. 103). If he is unable to identify his own signature, after the lapse of time, the genuineness of the signature may be established by comparison with other signatures of his (Kātyāyana, p. 104). Testimony rests on memory. Arbitrary rules of the duration of the period, during which such memory is allowable—, e. g. of a deposing witness upto seven years, of a casual witness for five years, a secret witness upto the third year and an indirect witness upto a year—may be deemed merely recommendatory, for as Nārada owns (p. 104) the evidence of a man of good memory, with undamaged faculties, will be valid even after a very long period.

#### *Indirect Testimony*

Manu lays down (p. 98) that evidence in accordance with what has been actually seen or heard is alone admissible (VIII, 74). A *sākṣin*, according to Nārada is one who has actually *seen* with his own eyes. This is in accordance with the modern rule of preference of direct knowledge. Medhātithi holds that Manu's rule is against indirect or hearsay evidence, This is so today too. But secondary evidence may be accepted in certain circumstances: the death of the appointed witness or his having gone to a distant place, which makes his presence in court impossible, or the appointed witness dies but there are persons who have heard his statements on the matter in dispute. Accordingly, Viṣṇu (VIII, 12) rules that an appointed witness having died abroad, those who have heard his depositions may give evidence. This is in accordance with modern practice.

#### *Circumstantial Evidence (Yukti)*

*Yukti* may be taken as circumstantial evidence from which an inference, warranted by reasoning, may be drawn. Bṛhaspati has a famous dictum that there is loss of Dharma in a trial devoid of the application of *yukti* (*yuktihina-vicāre tu dharmahāniḥ prajāyate*). Śankhalikhita state that "an adulterer is proved to be such by being caught playing with a woman's hair, when she is another's wife, an incendiary by being caught with firebrand in his hand, near a house on fire, a murderer by being caught near a murdered man, and a thief when found in possession of some of the stolen articles." Such presumptions are noticed in the *Indian Evidence Act*, sec. 114. The famous story of Māṇḍavya, which is cited in *smṛtis*, is an instance, often given, of the risk of coming to conclusions by apparent signs, or circumstantial evidence alone, when not critically weighed. In such cases Nārada (IV, 289) and Manu (VIII, 114)

provide for special oaths (*śapatha*) to clear up suspicions arising from circumstances.

#### *Evidence on Commission*

When it is impossible to bring into court a witness who is in a foreign land, his testimony may be recorded by Vedic scholars (*traividyāprahita*) and the record may be accepted by the court. This corresponds to evidence taken on commission provided by the Indian Evidence Act and the Civil Procedure Code, 485, order XXVI.

#### *Testimony of a Solitary Witness*

Gautama rules that the witnesses should be many (p. 105) and trustworthy, and might be even Śūdras. Yājñavalkya (II, 68-69) describes persons of austere life and learning as competent witnesses, but even they should at least be three in number (p. 105). Manu (VIII, 60) rules that a suit may be decreed against the testimony of *three* witnesses (p. 102). Brhaspati rules (p. 102) that the witnesses may go up in number from three to nine even, but a single witness should not be accepted for examination (*na prcchet kadācana*). Kullūka explains Manu, VIII, 66, barring a solitary witness, as due to the fear of the solitary witness dying or going abroad, and thereby frustrating a decision (*naiko vināśappravāsaśaṅkayā*). But a sole witness is allowed when both parties agree to it, and the witness is a person of undoubtedly high character.

Other instances of the admissibility of a single witness are, (1) if he alone was taken into confidence when a deposit was made (in such a case alone), or (2) is one sent by the litigant, or (3) is a jeweller who alone is competent to identify jewels.

Witnesses have to be men of character, and preferably of the first *varṇa*, and devoted to its religious duties. They must be known for their impartiality and rectitude. They must belong, if possible, to the same group as the parties (*śreṇi*), and, in the case of suits or cases involving women, women witnesses should be preferred (p. 107). For litigants of the first three *varṇas*, witnesses should preferably be of the same *varṇa*, or of groups (*varga*) of the same group. Śūdras of good character should be accepted in cases involving others as well as Śūdras (p. 107).

#### *Disqualified Witnesses (Asākṣiṇaḥ)*

The smṛtis give long lists of persons who should not be witnesses. It may be presumed that the rules are only recommendatory in most cases, or indicative of the inherent defects in the witness. According to Nārada inadmissibility to be taken as witness may spring from (1) a rule of smṛti, (2) or lack of character in the witness, or (3) contradiction, or (4) bad disposition or (5) intervening disease. (p. 108).

In the first group come persons who have renounced the world, or have no interest in worldly affairs or are unlikely to watch them, infants (*śiśu*), insane persons or drunkards (habitual), or rakes, outcastes, adulterers, persons who live by prostituting their women, and atheists. Exclusion on the ground of inconsistency in statements of the witness, can arise only after the hearing. It is a case for rejection of testimony, and not for rejection of summoning, unless of previous conviction for such an offence. Persons of manifest bad character (*dr̥ṣṭadoṣa*) are excluded. An interested party is to be excluded, if he has an interest in the suit. An abettor (*sahāyin*) or accomplice is also to be excluded, *i. e.* his testimony is to be rejected. The idea is apparently to reject the unhesitating acceptance of the testimony of relations and interested persons, not their rejection as witnesses. The ground of exclusion (or suspicion) is common interest between witness and party. Manu will allow a relation (*bandhu*) on failure of other witnesses (VIII, 70). An enemy (*ripu*) is excluded on manifest suspicion. Born slaves or dependant labourers are also excluded. Incompetency on account of want of reasoning faculty arises in "infants" (*śiśu*). In modern practice even the testimony of a child, which shows intelligence, though only eight or nine years of age, is allowed. A person of senile age (*vr̥ddha*) is excluded similarly. Persons with deficient limbs or suffering from incurable disease or eunuchs are excluded because of their faculties of perception being defective, or because their defects are the results of their bad *karma* in past births (Manu, XI, 49-52). Persons who are deficient from a religious standpoint are excluded, as obviously the oaths that are administered to such witnesses cannot be felt by them to be binding. The exclusion of women from being witnesses is on the presumption of fickle-mindedness in them. But Manu's acceptance of them in cases where women are concerned will show that this cannot be the real ground. Medhātithi (VIII, 68) explains that the rule of exclusion of women from being witnesses applies to cases where both parties are *men*. When the suit is between two women or between a man and a woman, the exclusion disappears. The admissibility of women to testify on failure of qualified witnesses is explained by Medhātithi as implying that they are competent to testify in cases which are recent, as there has been no interval of time in which their minds might waver!

There are over a score of exclusions on account of low birth or professions. Exclusion, as a kind of privilege, is instanced by that of the king and royal officers or of *śrotriya*s, who must be constantly engaged in religious duties. The exclusion is not an indication, as pointed out by Medhātithi (VIII, 65), of their want of credibility, but to save them from being taken away from important religious duties. One who volunteers evidence is not to be accepted (p. 114.)

A witness summoned by one party should not be asked by his opponent to testify (*Kātyāyana*, p. 116).

Witnesses barred on specific rules will still be admissible in cases involving grave crimes ( p. 118 ).

#### *Priority among Witnesses, its determination*

The relative value of evidence of witnesses of the different classes does not arise in cases of violence, assault, theft and defamation, and the competence of those who give such evidence should not be scrutinised too closely ( Manu, VIII, 72 ). Kātyāyana adds transgression of the king's commands to this list, along with complaints in regard to what took place within a house, at night, or outside the village. In cases of violence those who are ordinarily barred from giving testimony, like slaves, the blind and the deaf and lepers, are examinable ( p. 118 ). The underlying idea is that if one insisted on *absolute* acceptability in a witness, it may be difficult in some cases to get any evidence at all. But Nārada ( p. 118 ) would still exclude from giving evidence children ( because they might speak falsely through ignorance ), relations ( as they might depose falsely from affection ), an enemy ( as he might depose falsely from the desire of revenge ) and women ( because of habitual untruthfulness ! ). Manu ( VIII, 77 ) ascribes the exclusion of women in evidence to their fickleness. But there is no exclusion of women from giving evidence altogether, as they are permitted in suits in which both parties, or one of the parties is a woman ( Manu, VIII, 68 ). Manu would reject the evidence of men who are very senile, or are of depraved mind or are diseased.

#### *Rejection of Testimony of Witness*

The rule is that any disqualification of a witness that would make him unfit to give evidence should be stated openly in Court by the party objecting, and at the very beginning. The challenge should not be after deposition has begun. A false or malicious attack on witnesses makes the attacker punishable ( p. 120 ). Vyāsa rules that the defects of a witness should be stated in open court, and in writing, and the Court must ask the witness to refute them, or stand aside, but if the witness protests his innocence, the challenger must be asked to substantiate his statement impugning the witness.

#### *Examination of Witnesses ( Sākṣīśrāvaṇam )*

The smṛtis insist on the examination of witnesses and hearing them with as little delay as possible ( p. 126 ). Witnesses should be put on oath ( *śapatha* ) after being called up, and then closely examined, one after another. The deposition must be in the presence of *both* parties in certain cases, the depositions should ordinarily be taken near the objects in dispute, *e.g.* cattle, bipeds, or immovable property ( p. 123 ), but witnesses can be made to depose even in the absence of things to be weighed, or counted or measured.

The examination should be in the morning, and after both judges and

witnesses have purified themselves (by baths etc.). The examination should take place before images of gods and in the presence of Brāhmaṇas. Elaborate exhortations to witnesses, appealing to them to speak the truth, the whole truth and nothing but the truth, and pointing out to them the spiritual merits of speaking the truth and the danger of sinning by false testimony are given in Smṛtis. 'The perjurer commits the same sin as the incendiary, the slayer of children and women, warns the judge' (Yājñavalkya, p. 125).<sup>1</sup> All merit acquired from birth will, it must be exhorted, be lost by speaking falsely. The guilty judge, the guilty witness and the killer of a Brāhmaṇa are equals in sin. By telling the truth, the witness must be warned, he attains fame in this life and beatitude after death (p. 122). Truth is greater as a conferrer of merit than a thousand horse-sacrifices (*aśvamedha*)—A perjurer, adds the exhortation, suffers the pangs of a discarded wife. Truth is the stairway to Heaven (*svargasya sopānam*, p. 127). Truth is better than a hundred sons. One who speaks truth attains godhood even in this life (p. 128). Generations of deceased ancestors are ruined by the false deposition of a descendant (Baudhāyana, p. 129).

Such exhortations will be effective only on believers in Dharma. The exclusion from being witnesses of agnostics (those who have no faith in religion), atheists, and apostates will be intelligible from this type of exhortation. The exhortation is made along with imprecations. The oath (*śapatha*), which is described in detail in smṛtis (*inf.* pp. 131-135), will be ineffective on those who do not believe in Dharma and *Karma*. All the merit (*sukṛta*) that a virtuous man acquires will be lost by speaking falsely, or defeating unjustly an adversary in a suit (Yājñavalkya, p. 135). So will it be ineffective too in persons of high birth (Brahamaṇāḥ) who take to ways of life condemned for their varṇa. (p. 135). *Manner of Testifying* (pp. 136-137).

The witness should testify in a reverential manner. He should lay aside his head-dress, touch gold and cow's urine (*gomaya*) as a purification, and speak lifting up his right arm. In cases of manslaughter he should depose before an image of Śiva (*vādayet Śivasannidhau*, p. 136). He should not answer when he is not questioned. An unsummoned or uninterrogated witness should not depose (p. 137). When the deposition is made in a natural way, the witness should not be harassed by being questioned again and again.<sup>2</sup> The witness should speak of only what he himself has seen or heard (Baudhāyana, p. 137). That way will win trust.

*Evaluation of Witness* (p. 138)

The king (or in his absence the Chief Judge) should himself question the

<sup>1</sup> All such references are from Vyavahārakāṇḍa, published in G. O. S. Vol. CXIX.

<sup>2</sup> This is a virtual interdiction of cross examination.



witness in open court, but weigh the evidence subsequently along with the puisne judges (*sabhyāḥ*). Attention should be paid to the tone and manner of the deposition by the witness in evaluating the testimony. When the witness appears restless, shifts his position, licks the corners of his lips, loses color, perspires in the face, coughs and heaves often, scratches the ground with his toes, becomes dry-mouthed, falters in speech, speaks incoherently, is voluble and silent by fits, and will not meet the eyes of the questioning judge, he may be regarded as perjuring. But these are, as warned by Medhātithi (VIII 126) not proofs of dishonesty. Such symptoms may be displayed even by truthful and nervous witnesses unaccustomed to appear before courts, and they must be deemed only as needing observation for subsequent consideration by the judges. As witnesses are likely to become nervous if the King or chief judge shows anger, these are warned not to lose their temper, and to regard such signs as often natural to some persons.

#### *Allowable Perjury (Satyāpavādaḥ)*

Falsehood is "permissible" in testimony when truth speaking bring death to one of the parties. "By truth are witnesses purified; and so are they when they depose falsely to save the life of persons" (*Viṣṇu*). Speaking falsely from a pious motive does not make a witness who speaks so lose Heaven. (p. 146). Gautama, who adheres to this rule, modifies it by adding that speaking the truth in cases of confirmed and heinous offenders will not be sin (p. 146). But a sin *is* a sin, even if committed for pious motives and must be expiated. The expiations advised by Viṣṇu, Yājñavalkya and Manu in such cases are repeated by Lakṣmīdhara (p. 147). The *Mahābhārata* allows in a famous passage, lying in five cases.

#### *Strength of Evidence (Sākṣi-balatvam)*

The rule advised is that the evidence of a majority of witnesses should be accepted as truth but if the number testifying on both sides is equal, the decision should then go by observation of the demeanour and good qualities (birth etc.) of the witnesses, and where the good qualities are balanced, by the side for which Brāhmaṇas have testified. When numbers are equal on both sides, as regards witnesses, the side which has more virtuous men as witnesses should win. If, after the plaintiff has established his contention or case by a number of witnesses, the defendant produces more and better witnesses, the former loses his suit (*Kātyāyana*, p. 149). Among witnesses quality is to be preferred to mere number (*Yājñavalkya* II, 72).

Evidence of witnesses becomes worthless in some cases. Inconsistent statements by a witness, conflict of evidence as to time, place, age, matter, quantity, shape and species makes the evidence worthless. If in a suit for money

debt, the witnesses contradict one another as regards the amount their testimony is worthless.

#### *Punishment for False Testimony (Sākṣidaṇḍaḥ)*

A witness who says first one thing and later says what is contradictory to his first statement should be punished for deception (Kātyāyana, p. 141). Manu ascribes several obvious causes for false evidence: *e.g.* covetousness, distraction of mind, fear, friendship, lust, anger, ignorance and immaturity of mind (VIII, 118). He prescribes graded punishments according to the apparent cause of the falsehood in testimony. These range from the lowest amercement in cases of lying through nervousness, two middle amercements if it is due to fear, and four times the lowest amercement if it is through friendship, and ten times of it if it is done through lust, three times the second amercement if it is due to wrath, two hundred *paṇas* if it is due to ignorance and a hundred if it is due to puerility (VIII, 121). The severity of the penalties is explained as designed to prevent a failure of justice and in order to restrain injustice (VIII, 122). Banishment, in addition to a fine, may be the penalty for perjury by Non-Brāhmaṇas but exile alone is the punishment for a Brāhmaṇa perjurer. (*Ib.* 123). Viṣṇu would, in addition to banishment, impose the confiscation of entire property as the penalty for perjury (p. 142). A witness who knows the facts but stands mute when questioned, deserves the same penalty as a perjurer (Viṣṇu, p. 143), and one who refuses to testify shall be fined ten per cent of the value of the property in dispute (Kātyāyana, p. 143). Delaying evidence for three fortnights is punished by a fine of ten per cent of the value of the property in dispute (Manu, VIII, 107), and Kātyāyana would punish the witness who, knowing the facts, will still not testify, with a fine equal to the value of the property in dispute. The hand of God is seen when a perjurer suffers from disease or a fire accident within a week of his deposition (p. 143).

#### *Documents (Likhita).*

Even within six months, declares Bṛhaspati (p. 152), doubts about facts will rise in human mind. It is to avoid them that the Creator has invented Documents. Marici (p. 152) affirms that the genuineness of gifts, or sales of landed property is not provable unless the acts have been recorded in documents.

A document needs attestation, which may be of different kinds. Viṣṇu divides them into three classes from this standpoint: those written before the King (*i. e.* before an official who attests them, like the modern Registrar of Assurances); those bearing the signatures of witnesses; and those that have no such superscription. Nārada (IV, 135) classifies them as (1) those written in the hand of the executant himself and (2) those written by another's hand. The

second alone needs attestation. Documents again may be public (*rājakiya*) and private (*jānapadiya*); and the latter may be written in his own hand by the executant and or may be written by a scribe or another person. The *Mitākṣarā* (II, 22) calls the *rājakiya* document *śāsana*, and the other *ciraka*. The *jānapada* documents are of different kinds: deeds of partition (*viḥhāga-patra*), deed of gift (*dānapatra*), sale deed (*kriyāpatra*), mortgage deed (*ādhipatra*), deed of convention by villagers (*samvitpatra*), deed of bondage (*dāsapatra*), deed of debt (*ṛṇalekha*), deed of purification (*viśuddhipatra*) attested by those present at the purification for sin, compromise deed (*sandhipatra*), deed defining boundaries (*śīmāpatra*) submortgage deed (*anvādhipatra*) and *upagata* (receipt). A document attested by an accountant or state official is regarded as if it was attested by the King himself (Viṣṇu, p. 153). A state document is signed by the King or bears his seal (*mudrā*).

The classifications are not exhaustive. The royal deed is said to be superior (in authenticity). The royal deed is said to be superior (in authenticity) to the *jānapada*, the *jānapada* to *svahasta* attested by witnesses and the last to a *svahasta* which is unattested by witnesses.

Two witnesses were usually regarded as sufficient for attestation. Full details regarding dates, places, residence, parentage etc. should be furnished in document.

#### *Grant of Decree (Śāsana)*

A royal grant has to be engraved on a copper plate, and written by the Sāndhivigrahika. It should mention place, family lineage, place, village to be donated, and declared valid in regard to the gifts as long as the Moon and the Sun last (p. 157). When a king makes a gift of a village or land all these details should be given in the copper plate, which must have the royal seal also. The terms of the gift should be indicated in it.

The document which records the decree of the Court, after an enquiry, is called *jayapatra* or *paścātkāra* (p. 160). It should give a resume of the enquiry, and the statements of plaintiff and defendant, evidence and the decision of the court fully (*Kātyāyana*, p. 160). The king of chief judge, and the other judges should sign the document.

#### *Valid Documents (Sallekhyā)*

A document is valid if it is duly attested, after being legibly written and in clear language, following local usage as to documents, and if it gives all details that are necessary fully (p. 261).

A document which is declared invalid should be annulled at once. If it is not done, and it is allowed to remain, it has validity. When a document is

lost, or damaged or is illegible or torn or burnt, a fresh document must be made (p. 262). The fresh document may be written in his own hand by the party.

#### *Invalid Documents ( Duṣṭalekhya )*

Documents executed by a dying person, by children, by frightened or desperate persons, by women, by intoxicated, mad or grief stricken persons, or executed at night or by force are deemed invalid (p. 263). A document recording a loan held by a creditor, which is however unattested, is void unless the creditor proves the debt otherwise. A document opposed to local usage, which is ambiguous and incomplete in the specification of matters and is executed by one who is not the owner, is also invalid (Kātyāyana, p. 164). A document spoilt by fire, or executed long ago, or dirtied and illegible, or which contains mutilated or effaced syllables, or is for a brief period only may be declared invalid (p. 164). A deed in which the lines are irregular, is in ambiguous wording and which does not possess the characteristics of a genuine document is invalid (p. 264).

#### *Testing Genuineness of Documents that are suspect*

A document bearing the royal seal must be accepted as genuine (Prajāpati, 168). If a document is in the hands of one who is not the owner, its coming into his hands must be investigated (Vyāsa, p. 167). Careful scrutiny of a document, whose authenticity is doubted, is necessary by comparing its writing with that of the alleged writer, and noting any peculiarities in its wording or tenor (Nārada, p. 167). Vyāsa warns us against accepting the authenticity of a document from its apparently genuine writing as clever forgers fabricate documents that look genuine (p. 166). Dishonest relations try to cheat women and children and illiterate persons by fabricated documents (Bṛhaspati, p. 166). When the witnesses, scribe, creditor and debtor of a document are all dead, there is reason to suspect its genuineness, says Nārada. (IV. 138.)

#### *Strength of a Document ( Lekhyabalam )*

In order to combat possible challenges in future of the genuineness of a deed, Bṛhaspati advises its owner to exhibit and read it in assembled family groups, meetings of traders and co-habitants, so as to ensure its authenticity beyond dispute (p. 170). When a document has been produced when required, and frequently also, it remains valid for ever (Nārada, IV. 140). A document which has not been questioned for twenty years is valid (Kātyāyana). When a thing has been enjoyed for twenty years without question, the document sanctioning the enjoyment is beyond challenge. A boundary dispute can be settled and recorded in a document. If this remains unchallenged for twenty years, its validity after the period cannot be raised. When a pledge is

made, if the pledgee has been enjoying it, the document on the pledge is valid. A document in the handwriting of a wellknown scribe is unquestionable.

#### *Importance of Documentary Proof*

A document is stronger than oral evidence or even ordeals ( p. 173). A documentary proof can be over-ridden only by another document.

When a document has not been heard of for thirty years, and is then produced, its validity is gone; so also a document relating to a debt challenged to be owing by a wealthy man, who is easily found, is relied on to claim the debt, it is deemed suspicious. A document which has not been heard of for a long time (*bahukālam*), nor seen, or relating to a debtor who is dead, and which is not tied to a pledge, must also be deemed suspect. When a document has been taken away to another country, or is partially burnt, or is badly written and not quite legible, time should be granted to its owner to establish its authenticity. If the document has completely disappeared the evidence of those who had seen or read it must be produced ( p. 175 ).

After a debt is discharged the document recording it must be destroyed ( Yājñavalkya, II, 931 ) or a receipt (*upagata*) for the amount paid taken.

#### *Punishment for forging Documents*

The fabrication of royal edicts as well as private documents is a very grave offence, and the capital sentence is prescribed in smṛtis for both ( Manu, IX, 232 and Viṣṇu, 9-10 ). The highest fine is prescribed for one who adds to or writes less than what is containable in a royal grant (*śāsana* ).

#### *Jayapatra and Paścātkāra*

Lakṣmīdhara mentions both. *Jayapatra* (document of victory) is the judgment decreeing the suit and handed to the successful party. It must contain in a summary form all relevant matters concerning the suit and trial : e.g. a summary of the plaint and of the rejoinder, the decision as to the party on whom the burden of proof was laid by the court, and the pleadings and depositions of the parties and witnesses. It should be signed by the King and bear his seal, if the suit was conducted before him, or of the Chief Judge and the *sabhyas* and bear their seals or signatures. The comprehensive character of the document is necessitated by the possibility of appeal or retrial. If the defeated party takes a different stand from that recorded in the *jayapatra*, as his in the original trial, as revealed, his prayer will be rejected. If these were not mentioned in the *jayapatra* there will be no means of knowing what stand the appellant had previously taken. To the defendant also it is of value, if he appeals on the ground of *res judicata* ( Raghunandana's *Vyavahāratatva*, p. 60 ).

A decree which records the grounds for non-suiting a party ( e.g. contradictions in statement, hostile attitude towards judges and witness, non-appearance,

silence, and absconding) is termed *hīnapatra*, as distinguished from *jayapatra*. This used to be given to the defeated party.

Kātyāyana applies the name *pāścātkāra* (p. 169) to the judgments in suits in which after a hot contest the plaintiff succeeds, while the case in which the decree is briefer because the defendant admits the claim is merely a *jayapatra* (P. V. Kane, *Vyavahāramayūkha*, Notes, p. 53)

#### *Possession (Bhoga, Bhukti)*

Title (*āgama*) and possession (*bhukti*) are the definitive sources of legal ownership, if found together. But each has its own strength too, and ownership may arise from one, or not be lost when the other exists. Possession may be with title (*āgama*) or without it (*anāgama*). Among the ways of acquiring ownership (Gautama, X, 40-41 and Vasiṣṭha, XVI, 16) by gift (in the case of Brāhmaṇas), by conquest (in the case of Kṣatriyas), by trade (in the case of Vaiśyas) and by labour (as wages, in the case of Śūdras, as well as by inheritance, purchase, partition, seizure or appropriation (as of forest trees), finding (as of ownerless property or *res nullius*) and dowry none are specified as conferring ownership by mere enjoyment or possession (*bhoga* or *bhukti*). Possession may be with title or without it. The separation of one from the other may lead to questioning of ownership. When both exist together the title is indefeasible. A verse, cited as from Vyāsa and Pitāmaha (but is not cited by Lakṣmīdhara) sums up the features of a valid ownership as five : title (*sāgama*), long standing, unbroken use, use without objection being raised by any one, and in the very presence of any who questions the right. Yājñavalkya emphasises the need of both for unquestionable proprietary right : "Title is superior to possession (or enjoyment),"—p. 180, and "in title there is no strength if it is not combined with possession even for a short period" (p. 185). Title and possession lend strength to each other. When ownership is transferred it has to be coupled with delivery of possession. Brhaspati states that when ownership is acquired in one of the ways mentioned it becomes effective only when coupled with title (*sāgama*, p. 177). Possession is not essential to transfer of property but when uncoupled with it, it is risky.

Long possession is usually construed as a sign of ownership by right also. When land or landed property is enjoyed by another in the very sight (*paśyataḥ*) of the title-owner and without any protest from him, it *will* lead to the conclusion that the possessor has acquired ownership also. Nārada (p. 185) affirms that the enjoyment of a property by one who has no title to it, even for a hundred years makes the occupant liable for punishment by the king with the penalty prescribed for theft (*coraṇḍa*, p. 185). Adverse possession, of a property like possession by silent acquiescence, will lead, after the prescribed period of prescription to its becoming the property of this possessor (Nārada,

p. 185). The statement is coupled with the warning to owners not to allow strangers to enjoy their property without protest. Manu holds that an owner who allows his property to be enjoyed by another without protest, does not deserve to get it back (p. 189). Brhaspati also warns that he who does not protest when an enjoyer is giving away his property, in his own sight, cannot hope to get it back, even though he has the title deed (p. 188). Ownership in movables as well as immovables can be secured only by vigilance in an owner guarding his title and control of the property (p. 188).

### *Prescriptive Right in Possession*

Ownership will seem without basis if it exists for even generations without an assertion of it by the nominal owner. The application of the rule of prescription can alone avoid the confusion that will arise if an owner, who has long been indifferent to enforcing his right against an occupant, asserts his right after a very long interval. If a property is sold or bought, the buyer will endeavour to safeguard his interests by getting both rights. Ownership (however it may spring) must be clear before one can safely buy a property. It is to meet such cases that prescription arising from long, unquestioned and uninterrupted possession is made to mean ownership even without title. Such smṛti rules as that even a hundred years of occupation by another will not extinguish the owner's right in the property (p. 185, Nārada, IV, 88) and property enjoyed without ownership should be classed with things that are held without ownership (like *anvāhita*, explained by Asahāya as a valuable object received in return for a worthless one), with things that are robbed (*hṛta*), deposits, and those that are held by force, articles lent for use and articles enjoyed in the absence of the owner (p. 185). There are two ways of determining the length of time that will constitute valid prescription capable of converting possession into ownership, e.g. firstly, by making it equal to what can be remembered even after a long period (*smārtakāla*), and secondly by treating it as passing from generation to generation of occupants in the same family. The first is described as a hundred years, and the second as three generations excluding the present occupier. This again leads to the determination in years of the life of a generation. Brhaspati puts it at 35 years and Kātyāyana at twenty years. Under the former, three generations will mean 105 years, which is the length *smārtakāla* according to the *Smṛticandrikā* (Ed. Gharpure, II. p. 72). The Vedas put the duration of human life as a hundred years (*śalāyuh puruṣaḥ*). But as generations overlap, Kātyāyana makes three generations equal to sixty years in which uninterrupted possession develops into ownership (p. 180). Gautma, Manu and Yājñavalkya (II, 24) appear to hold that even twenty years, and Brhaspati thirty years of adverse possession will make it ripen into ownership of *immovable* property, while later

smṛtis like Nārada and Kātyāyana would put the period higher and make it sixty years—an apparent compromise between three lifetimes and *smārtakāla*. As regards movable property the duration of use is made lower, and fixed at ten years. It is held that beyond these periods there is *hāni* or loss of right.

What is this *hāni*? Dr. Amareshwar Thakur (*Hindu Law of Evidence*), classifies the different views of jurists on the effect of prescription in producing *hāni* or loss thus: (1) *svatvahāni* or loss of proprietary right, (2) *vyavahārahāni* loss of legal remedy to owner by passive acquiescence of alien occupation, and (3) *phalahāni* or loss of the right to collect the produce, or intermediate profits. The last position is held by the *Mitākṣarā* but is rejected by Caṇḍeśvara, Devaṇṇa Bhaṭṭa and Raghunandana. *Vyavahārahāni* is loss of legal remedy to the owner by his passive acquiescence in alien occupation, and is apparently based on a text of Nārada that the suit for recovery of property by a person who has been silent and indifferent (*upekṣām kurvatastasya, tūṣṇīm bhūtaśya tiṣṭhataḥ kāle vipanne pūrvokte vyavahāro na sidhyati*) will not succeed. The neglect is both verbal protest and physical effort to get the property. The owner loses the right of recovering his right by human proofs (*i.e.* he can get them back by ordeals.). *Smṛticandrikā* cites in support of this interpretation a halfverse from *Smṛtisamgraha* to say that absence of occupation (*abhukṭi*) makes the right of ownership ineffective (*āgama moghaḥ*), and it interpretes *āgama* as the grounds of claim by documents and witness (*tatpramāṇabhūta-likhita-sākṣinau*) \*

The loss of proprietary right (*svatvahāni*) by prescription is upheld by Asahāya, the oldest commentator now known on a verse of Nārada (I, 78) declaring that title can be extinguished by adverse possession of long duration. This view is attacked by Viśvarūpa, Medhātithi and Jīmūtavāhana.

The loss of intermediate profits (*phalahāni*) is upheld by Vijñāneśwara. This view is rejected by Caṇḍeśvara and others.

#### *Exceptions to Prescription*

Ownership acquired by prescription will not apply to *strīdhana*, the property of minors, of idiots or of temples or of the King. When near relations or a son-in-law or a learned *Brāhmaṇa* is allowed to enjoy a property, the right to it is not lost even by long enjoyment by these. The same rule applies to the property of an enemy (*śatru*, p. 191). The property of persons who are physically deficient, or are indolent, or diseased or are panicky by nature (*bhīla*) or are away in distant lands, will not be lost by adverse possession (p. 190).

#### *Determination of Interrupted Possession*

When interruption of possession occurs in immovable property, the right has to be established by evidence. The relevant witnesses are neighbours, or

\* *Dharmakośa*, I, i, p. 424.



those who know the names, titles, situation, area and title as well as the nature of the interruption of occupation or enjoyment. The decision should be based on such testimony provided the Court is satisfied of the knowledge and impartiality of the witnesses. When evidence of the ordinary kind is lacking in such cases, recourse must be had to ordeals for settling the question (p. 193).

### *Reasoning ( Yukti )*

Decisions in suits cannot be delayed unduly. When the evidence of witnesses is lacking by either their not being able to testify or the delay in in getting them, the Court must exercise its reasoning faculty (*yukti*) to get at the truth, or decide on administration of oath (*śapatha*). Thus, when a defendant does not refute the case against him, even though reminded thrice, in a case of debt, he may be ordered to pay off the debt (p. 194). A defendant's silence, when an assertion he can rebut is made in court, and in his hearing, must be taken as his acquiescence. A person who does not refute the claim for money alleged to have been lent to him should be deemed a debtor. If several assertions are made against the defendant, and one of them alone is proved by evidence, the rest may be taken also as established (p. 195). Circumstances cannot lie, while witnesses can. Circumstantial evidence is thus valuable. In a case of incendiarism, if the defendant or accused is caught with a firebrand in his hand, or an alleged murderer is found with a weapon in his hands, or an alleged adulterer has been found dallying with the wife of another person with whom he is said to have committed adultery, and seen catching her by her hair etc., or when a bridge has been destroyed and the suspected person is found with a hatchet in his hand close by, or a person is found in possession of stolen property, there are grounds for presuming them to be offenders and proceeding to enquire into their offences. In such cases, reliance on eye-witnesses alone will not establish. Kauṭilya (*Arthaśāstra*, IV, 12) states that an alleged adulterer's guilt may be inferred and held proved by marks of finger nails or teeth or scratches on his body or lips or by the admission of the woman concerned. But, as pointed out by Nārada (IV, 176), such signs must not be too readily accepted as proof of guilt, as a cunning enemy of the accused might make such marks to incriminate his foe. Consciousness of guilt and desire to escape punishment will often induce accused persons, who have weak defences, to try to bribe or corrupt members of the court or witnesses. In such cases, the attempts, if established, might be presumed to point to the guilt of the accused person, or a defendant in a suit for the return of money lent (*Kātyāyana*, ed. Kane, 337-338). Failure to apply proper reasoning is said to have brought about the conviction of the innocent sage Māṇḍavya as a thief, because from fear of torture he admitted that he was a thief when he really was not one.

### Oaths (Śapatha)

*Śapatha* stands for both oaths and ordeals as means of establishing guilt or innocence. Lakṣmīdhara gives 'ordeal' (*divya*) as the synonym for 'oath' (*śapatha*) in interpreting the expression *śapathakriyā* as the heading of the section in Viṣṇusmṛti (p. 198). He deals with *śapathavidhi*, rules of oaths, after dealing in detail with ordeals. Oaths are very ancient. Manu in justifying them (VIII, 110) states that oaths have been taken both by divine persons and sages for clearing themselves of charges. Medhātithi and Govindarāja point out that the seven sages purified themselves by oaths, when accused mutually of stealing lotus fibres (*Mahābhārata*, XIII, 93, 13 ff.), and Indra took an oath when accused of adultery with Ahalyā. When Viśvāmitra charged Vasiṣṭha with being a demon and with having devoured his sons, the latter cleared himself by a *śapatha* (R̥gveda, VII, 104, v. 15).

The oath must be taken in connection with something vital to the *varṇa* of the person subjected to it: thus, the Brāhmaṇa must swear by Truth, the Kṣatriya by his weapons and vehicle, the Vaisya by cows, seed-grain and gold, and the Śūdra by imprecating on his own head all sins (*pātaka*). They should be made to touch the heads of their wives and children (invoking suffering on them if they swore falsely. Bṛhaspati (p. 256) suggests oaths only for minor offences, and ordeals for major ones. The swearer must swear by his acquired spiritual merit, and offer to lose it if he swears falsely (p. 257). When the oath taker is not met within a few days by misfortunes, he will be deemed cleared of the charge. The limit for the misfortune is the fourteenth day.

### Ordeals (Divya)

Ordeals are divine means of proof and so are termed *divya*. The Supreme Being or Divinities are held to intervene, when properly approached, and indicate guilt or innocence, after an ordeal is performed in the manner laid down by smṛtis. The idea is widespread in the world. The use of the ordeal is based on the belief that God intervenes miraculously to vindicate innocence and establish guilt, when other means of doing so are unavailable. *Divya* is defined by the *Divyatatva* of Raghunānanda (p. 574) as that which decides a matter in dispute when it cannot be decided by human proof (*mānuṣapramāṇa-anirṇeyasya nirṇāyakam yat tad divyam*). Nīlakaṇṭha (*Vyavahāramayūkha*, ed. Kane, p. 44) defines *divya* as that which decides a matter in dispute not determinable by human proof (*tattu mānuṣapramāṇa-anirṇītārtha-nirṇāyakam*). The use of ordeals is ancient and world-wide. Medhātithi gives a rational explanation of the application of ordeals and oaths by pointing out that they are means of frightening superstitious persons into telling the truth (VIII, 116). But he counters this statement by saying that the failure of ordeals to establish innocence cannot make one reject them, as similar failures occur when recognized

means of proof are also applied. Nārada's (IV, 241) direction that *divya* is to be applied when transactions done in secret, without witnesses, in lonely places or at night, when ordinary evidence is naturally unobtainable, show that it is to be a last resort. Sītā submitted to an ordeal (not of the nine kinds described in *smṛtis*) to prove her chastity. The dependence of the ordeal on belief in its effect by the party subjected to it is shown by the rules interdicting its application to cases where the party to be subjected to it is an atheist (Nārada, IV, 332, p. 207) or a *vrātya*. Similarly an ordeal should not be offered to those who are irreligious, those who wear queer emblems of sects, and experts in *mantra* and *yoga*, who might counteract the ordeal by their special powers (p. 208). It is also apparently on this ground that ordinarily *both* parties must agree to the application of the ordeal, though in certain cases the King can order its being used in grave crimes. The religious basis of the test is also shown by its interdiction to those under a religious vow (*savrtāḥ* p. 207). The fear of chances of escape of the criminal if an ordeal is applied in cases of parricide, matricide and the five great sins (*māhāpātaka*, p. 208) leads to their being discouraged in such cases.

It is noteworthy that the earlier *smṛtis* do not deal much with ordeals. Gautama, Vasiṣṭha and Baudhāyana are silent on its application. Manu mentions only two, *viz.* the fire ordeal and plunging into water. Yājñavalkya and Viṣṇu mention five ordeals, and Nārada mentions in addition to these the *taptamāṣa* and the *tanḍula* ordeals. The full number of nine ordeals is mentioned by Pitāmaha. Bṛhaspati (p. 198) also names all the nine. These are:— (1) the ordeal of the balance (*tulā* or *ghaṭa*); (2) the ordeal of fire (*agnī*); (3) the ordeal of water (*loya*); (4) the ordeal of poison (*viṣa*); (5) the ordeal of consecrated water (*koṣa*); (6) the ordeal of grain (*tanḍula*); (7) the ordeal of the heated piece of gold (*taptamāṣa*); (8) the ordeal of the ploughshare (*phāla*); and (9) the ordeal of Dharma. Instances of the use of these are found in history.

#### *Application of Ordeals*

Ordinarily the ordeal was imposed on the defendant. If he gets over the ordeal he wins. But Yājñavalkya (II, 99) gives the option to either party to undergo it by agreement. The defeated party has to pay a fine (*Śirṣa*) in addition to the loss of his case. An alternative is an offer by the party to undergo corporal punishment, if the test goes against him.

Ordeals are selected according to the value of the matters in dispute. All claims of over 1000 copper *pañas* are to be regarded as of great value, and to them the ordeals of balance, fire, water and poison are applicable. In cases of the "five great sins (*māhāpātaka*)" any one of the five may be applied without consideration of value on a money standard, and without binding the loser

made to drink the libation of the Sun-God ( p. 246 ). Śodhyas accused of theft and soldiers must drink the libation of Durgā. In the case of minor charges, the water in which the weapons or emblems of the god have been bathed are enough ( *Viṣṇu*, p. 246 ).

A guilty person subjected to the ordeal will be afflicted with illness or calamities within a few days of the test. The death of near relations ( *jñāli-maraṇa* ) is one such misfortune ( p. 247 ). Fever, dysentery, boils, pain in the palate and in the bones, throat diseases, head-ache and fracture of the limbs, as well as 'seizure by evil spirits' ( *daivikavyādhi* ) are examples of such misfortunes ( p. 248 ). Pitāmaha ( p. 247 ) allows three, or seven or fourteen nights for the appearance of such marks of divine displeasure on a guilty śodhya ( p. 247 ). Fires are other results. He on whom no calamity falls within fourteen days of the test, is declared by Yājñavalkya ( II. 113 ) as cleared of the charges fully ( p. 248 ). If misfortunes of this kind come after the lapse of a fortnight, they are not to be taken as justifying a fresh test, says Nārada ( IV, 331, p. 248 ). Brhaspati explains ( p. 249 ) that the indication of a fortnight or three weeks as the termination of the period within which the results might be seen are dependant on time, place and subject matter for which the ordeal is imposed ( p. 249 ).

#### *Ordeal of Grain ( Taṇḍulavidhih )*

This ordeal, which is not one of the classical five, already described, is to be imposed on Śūdras alone ( p. 250 ). Rice should be soaked in the water in which idols have been bathed, and it should be kept so for a night. The next day the śodhya must be made to eat it, facing the Sun. He must be made to spit and if the spittle is found free of blood he is innocent, and if blood appears in it, he is deemed guilty. A sign of guilt is shivering or if blood appears at the end of jaw ( p. 251 ).

#### *Ordeal of a Hot Piece of Gold ( Taptamāṣaka-vidhih )*

Twenty *palas* of *ghi* ( *ghṛta* ) or oil ( *taila* ) should be boiled in a vessel of copper, iron or earth, 16 inches in width, and four inches in depth. When the liquid is boiling hot, a piece of gold should be dropped into it. The śodhya must lift out the coin, with only his thumb and forefinger. Before the ordeal, the usual invocation to Dharma must be recited. The tested person should not shake his hand, with pain, and if boils do not appear on the fingers, he is declared cleared of guilt ( p. 252 ).

#### *Ordeal of the Plough-share ( Phālavidhih )*

A plough-share of iron, weighing twelve *palas*, and eight fingers long, should be made red hot and the thief ( *corah* ) to whom this ordeal is offered,

must lick it with his tongue. He is declared innocent only if his tongue is not singed, (p. 254).

#### *Ordeal of Dharma ( Dharmaja-vidhih )*

Pictures of Dharma and A-dharma should be drawn on two bits of paper, in white and black respectively. After the recitation of the usual invocatory *mantras*, which are believed to inspire the papers with life, the two papers are invoked, and after having bathed them in *pañcagavya* they must be concealed in clods of earth, and the clod should be placed within two new pots, which should be filled (with earth). The *śodhya* should pull out a clod, and if the picture of Dharma is found within it, he is cleared, and he is deemed guilty if that of A-Dharma is pulled out by him (p. 254).

#### *Other ordeals*

These nine exhaust the standard number approved. But in practice others have been in vogue, sanctioned by local custom, like putting one's hand in a pot within which is a cobra.

#### *Manner of Decision ( Nirṇayaprakāra )*

It has already been stated that the the four steps of a trial in court are the plaint, the rejoinder of the defendant, the court's decision as to who should let in evidence first (*i.e.* the party on whom the burden of proof is laid *i.e.* *pratyākālita*) and the evidence (*kriyā*). The ways of arriving at a decision (*nirṇaya*) are stated by Vyāsa (p. 258) as *pramāṇa* (*authority*), evidence, usages, oaths, king's order as compounding of the case by the parties (p. 258). Proof rests on documents (*likhita*) witnesses and occupation (*bhoga*) and as a fourth on inference (*anumāna*) from circumstantial evidence. When every means of proof is unavailable, the decision must be made by the king, acting on his own judgment (p. 258). A similar stand is taken by Brhaspati who makes Dharma, Vyavahāra, Caritra and Rājaśāsanam the four means of decision in cases of doubt (*sandigdha*). When the defendant is put on oath (*śapatha*) the decision is by Dharma, as also when ordeals (*divya*) are applied. That is said to be (*vyavahāra*) (or decision by legal proof) in which the judges use such means to establish what is right. *Vyavahāra* alone enables a decision when prevarification in a rejoinder is exposed (Brhaspati, p. 259). Whatever is practised, which is consistent with Dharma or not, is termed following local usage (*Kātyāyana*, p. 259). When a decision is made on circumstantial evidence it is termed *caritra* (*ib*). The king's order is to be made in those cases in which no evidence of the other kinds is forthcoming. In cases of doubt, owing to the conflict of authorities or total absence of evidence, it is the authority of the king that has to settle the matter (p. 259).

But the king's decision by command must be in conformity with justice

to pay a fine on defeat. Bṛhaspati ( p. 199 ) grades the ordeals according to the value of the matter in dispute, beginning with the poison ordeal for 1000 paṇas and above, and going down to the ordeal of Dharma when, the value is 100 or less. The value must be rated lower for a Śūdra than a Vaiśya and so forth ( p. 201 ). The decision as to the test to be applied rests on the Judge.

#### *Time for Application of Ordeal*

The selection of the ordeal also depends on the time when, in view of the matter being before the Judge, it has to be applied. Thus the ordeal of the balance may be applied at all seasons, but must not be used when a strong wind is blowing ( Nārada, IV, 259 ). The fire ordeal must be tried during rains, balance ordeal in winter ( *śiṣīra* ), water in summer and poison in cold seasons.

The water ordeal is prohibited in winter, and fire in summer ( Nārada, 259 ). Pitāmaha ( p. 203 ) rules that the months of Caitra, Mārgaśīrṣa, and Vaiśākha are good for applying all ordeals.

#### *Astrological Time for Application*

As divine tests must also follow suitable times, the *Mitākṣarā* ( 11,97 ) rules thus: " In astrology, when Jupiter is in Leo or Capricorn, as also when Venus is in obscurity, and in an intercalary month, an ordeal should not be tried; nor when Venus has become invisible. Also when the Sun is in Leo a test should not be applied nor on the eighth and fourteenth lunar days. The test and inauguration shall be on a Saturday or Monday." The *Mitākṣarā* adds that a Sunday is recommended by respectable people ( *śiṣṭa* ).

#### *Procedure in Ordeal*

Bṛhaspati states that an ordeal applied in improper places or times will be ineffective ( p. 212 ). If it does not also follow the procedure laid down, it fails. It must ordinarily be in a court, and before assembled people, and in the presence of the king ( or chief judge ) and learned Brāhmaṇas. Both the parties and the judges should bathe and the party should have fasted for a day and night, and be clad in wet clothing when tested. All ordeals should be in the forenoon ( p. 213 ). The ordeal should be repeated if it fails ( p. 213 ).

#### *Ordeal of the Balance ( Dhaṭavidhih )*

The balance should face east and be erected ordinarily in the court house ( p. 215 ), but it may be near the flag staff of Indra, or the Palace gate or at the junction of four roads. This is to ensure due publicity. It should be decorated. Vedic prayers and hymns should be chanted during the ordeal ( p. 216 ). Images of the gods should be installed in front of the scales. The person tested should sit on the northern scale and on the southern weights must be placed. The balance should be invoked and an imprecation on frauds must be recited ( p. 220 ). The man must be reweighed. If he has lost

weight in the interval, and the balance rises he is innocent, and if it lowers he is guilty. When it remains unaltered the result is indecisive ( p. 222 ) and a second test must be made ( p. 213 ); so also if the balance breaks during the test.

*The Fire Ordeal* ( pp. 224-233 ).

Figures of eight guardians of the quarters in circles (*maṇḍala*) must be made with cowdung, and *kuśa* should be placed in each circle.

The person to be tested should stand with wet clothes on the western *maṇḍala* with his palms open. The palms should be rubbed with grain to make any scars or wounds on it visible before the test. Leaves should be laid on the palms, and a red-hot piece of iron should be laid on the palm. An invocation to the God of Fire should be made. He should walk seven steps holding the red-hot iron and the palm should be rubbed with grain. If at the end of the day the palm is found un-disfigured the person is declared innocent ( p. 232 ). Even a slight burn will be evidence of guilt. ( p. 233 )

*The Water Ordeal* ( *Toyavidhih* ) ( pp. 234-239 ).

*Smyticandrikā* ( II, p. 116 ed. Gharpure ) states that the ordeal of water had gone out of use in its time. An invocation of Varuṇa begins the proceeding. A target, 22½ feet from the person to be tested, is erected. Three arrows are shot by two Kṣatriyas, while the person to be tested (*śodhya*) stands in water near a man standing in it with water upto his navel. After two arrows have been shot, *śodhya* stands in the water, holding the things of the man standing in water and then must dive into it. If when he raises his head the archer, who runs to seize the shot arrow does not see the back of his head, the *śodhya* is freed from guilt, but if the *śodhya* is found floating away from the place where he sank, he is guilty.

*The Ordeal of Poison* ( *Viśavidhih* )

After finding out if the *śodhya* has taken any antidote, the poison is to be administered, mixed with 30 times its weight in *ghi*, and might be of 6 or 7 grains weight, and it should be given when the *śodhya* has not breakfasted ( p. 242 ). An invocation to the poison should be chanted before it is administered. If the *śodhya*, after taking the poison, is found at the end of the day free from vomiting or facial signs of pain, he should be deemed innocent. For fear of deceit the *śodhya* should be watched for some nights ( p. 244 ).

*Ordeal of Libation* ( *Kośavidhi* )

The ordeal of the sacred libation may be held at all seasons. A *śodhya* must drink the water in which the idol of his favourite deity or the deity's weapon has been bathed, or the water in which the image of Durgā has been bathed or the image and circle of the Sun (*Sūrya*). A Brāhmaṇa must not be

*titthi* ). A decision which has accepted false evidence and is based on it is void. A judge should declare as void any mortgage, or gift or sale or acceptance, or other transaction in which he detects fraud ( p. 271 ). All transactions exacted by force are void ( Manu, VIII, 168 ). An agreement made by a person who is insane, or drunk, or grievously oppressed at the time by disease or by a slave is void. The acts of a minor are void. A person who is overpowered by love, or by fear or rage or by friendship is not competent to make a valid agreement. Transactions by a slave are void unless sanctioned by his owner. Gifts, mortgages, and sales made by those who are unfree are void, unless approved beforehand by those on whom they are dependant ( p. 272 ). Unless a woman is forced by distress (*anāpadi*) her mortgages, and gifts are void, but a woman's acts are valid if sanctioned by male members on whom she is dependent, like father, son or husband. The acts of the head of a family are valid only when he is free and in full possession of his mental powers ( p. 273 ).

#### *Legal Independence ( Svātantrya )*

As an act is valid only when done by a person who is free to do it, and the determination of the independence of different persons is necessary in law ( Nārada, p. 274 ) . The senior son in a family is its head and is independent. Three are free to act legally : the king, the preceptor (*guru*) and in all *varṇas* the householder *within* his own family. A pupil is unfree. Wives, sons and slaves are unfree in a family. A boy of eight or under nine is like a child in the womb ; a boy between eight and sixteen years of age (*pogandā*) is competent to do only religious acts. The sixteenth year is the beginning of majority. He is independent except as regards his parents, and his dependence continues as long as the father lives, even though he ( the son ) becomes grey-haired. The seniority in the family goes from father to mother and then to the eldest son. The junior members of a joint-family are legally not free. The younger members are free to act if authorised so, in the absence abroad of seniors. Whoever is appointed to do an act ( if he is not a minor ) is free to do that act ( p. 276 ), and so is he who is specially empowered to act as an agent (*nīṣṭārtha*). A father has no right to sell or give away his son, and giving a son in adoption is restricted to a minor son, who is not also the eldest son. Mitramiśra restricts even this power only to normal times and periods in which the family is not in distress ( p. 276 )

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## PART TWO

### SUBSTANTIVE LAW VIVĀDAPADĀNI

*Vyavahārapadāḥ :*

*Vyavahārapada* or *vivādapada* means "topic or subject of a dispute or law-suit." They are usually stated as eighteen in number. Manu, who enumerates the eighteen (VIII, 4-7), describes them as topics which give rise to law-suits. It is described by Yājñavalkya (II, 5) as a complaint to the king by a person who thinks he is injured by another in a manner contrary to law and usage (*smṛtyācāravyapetena*). The topics coming under this head have been traditionally brought under eighteen heads. Manu, who accepts this, adds however that the disputes of men come mostly (*bhūyiṣṭham*) under one or other of these eighteen heads. It implies that the enumeration does not exhaust all possible topics of litigation, as noted by Kullūka ("by the word *bhūyiṣṭha* it is implied that there are other topics of law, *anyānyapi vivādapadāni santi*. In enumeration there is some difference both in the order and in the topics dealt with among the eighteen. Dr. P. V. Kane has given a tabular statement showing the eighteen topics as given by Manu, and the same with some additions, given by Kauṭilya, Yājñavalkya (according to the *Mitākṣarā*), Nārada and Brhaspati. The number according to these is sixteen, twenty, eighteen and nineteen respectively. (*Hist. of Dharmaśāstra*, III, p. 249). As usual with him Lakṣmīdhara indicates in his *pratijñā*, at the beginning of the *kāṇḍa*, the topics that he deals with. But in it he makes subdivisions of headings, and does not follow the enumeration as under eighteen heads. But like others, he adds many topics primarily omitted, in the *prakīrṇaka* at the end.

But his habitual preference to Manu as an authority is seen here also in his following mostly the order of enumeration and the nomenclature of topics given by *Manusmṛti*. To a modern mind the classification will not seem scientific, but a rough discrimination between topics of civil law and criminal law emerges in the enumeration. A vital difference between modern systems and the ancient Indian is that in the latter both civil and criminal matters are brought up before the same courts and decided by them, though with small differences in procedure. Smṛtis note that law suits spring from demands about wealth or injuries. Yājñavalkya (II. 23) refers to the former as *artha-vāda* or disputes about wealth. The first fourteen roughly deal with civil suits, and the other four with *vākpāruṣya* (defamation and abuse), *daṇḍapāruṣya* (assault and battery), *sāhasa* (crimes of violence like murder), and *strīsangraha* (adultery). The rules regarding procedure and witnesses is almost the same for both civil

and Dharmaśāstra, according to both Bṛhaspati and Kātyāyana, and it is issuable only when there is a conflict between *śāstra* and the opinion of the assessors (*sabhyāḥ*). Dharma rests on truth, ordinary judicial work on witnesses, customs on records of usage, and the royal command on his edict (*śāsana*). The king attains fame for justice who knows the way of decision of cases in this fourfold manner (p. 260).

*Relative Force of Different means of Decision.*

The chief rules on the subject are those which have led to much misunderstanding by modern writers, and the creation of the myth of a regal power to create law by mere fiat. It has been dealt with already on pp. 6-8. The cryptic statement that among the four bases of a trial—Dharma, Vyavahāra, Caritra and Rājasāsana, each succeeding over-rules those preceding it has led to the myth of a royal absolutism, and Kauṭilya, Bṛhaspati and Nārada are supposed to have indicated it in such dicta. A decision by *vyavahāra* is one made exclusively by law (*śāstra*). It over-rules moral law. When a decision is based on custom, the usages or opinions of traders (*naigama*), it over-rules ordinary law (*vyavahāra*): for the king should not go against the usages of *pratiloma* castes, or tribes living in mountains etc. even if they contravene *smṛtis* (p. 262). A king can overlook customs and pass a judgment according to his own conviction, thereby his command over-ruling custom (*caritra*), because it is opposed to equity. The rule can have effect only in such circumstances, and only then can Dharma be saved from suppression (*bādhaka*) (p. 262).

*Action consequent on Decision (Nirṇītakṛtya).*

When a defendant has been decided against either by his own admission, or by observation of his demeanour by judges, and has been found to be wrong, the judges have to pronounce a judgment against him. Their decision will be given effect to by the king. If the defendant has merely denied a claim which is ultimately established against him by the trial, he must pay to the plaintiff the amount claimed, and also an amount equal to it to the king. A plaintiff, who sets up a false claim, which is rejected by the Court, must pay to the king double the amount claimed. These are obviously penalties for needless litigation over and above court fees. Manu makes the penalty on the defendant, against whom the decision goes, smaller. Thus, he rules (VIII, 139) that the court fee is 5% of the value of the claim and the penalty an additional 5%, making the amount payable by the defendant to the king 10% of the amount claimed if the claim was admitted and 10% over and above the court fee of 5% if the claim was denied. The admission by the defendant of the claim may be after his first denial of it. Such admission reduces the fine (Vyāsa, 264). Men of the Śūdra varṇa who make a false charge against a 'twice-born' person may

have the tongue slit by the king's order (Nārada, II, 37). When the defendant has denied many points in the claim, as made out in the plaint, and later on one point alone in the plaint is proved as against the wholesale denial by the defendant, the entire claim may be decreed, but not anything not included in the plaint (Nārada, p. 265). When a dispute is coupled with a wager (*saṇḍa*) and is decided the defeated party must pay the king the amount of the wager, in addition to the fine, and also the amount in dispute, to the creditor (p. 265). This is in accordance with the rule that the punishment should be suited to the offence (Bṛhaspati, p. 265).

#### *Acknowledgement of Success in the Suit (Jayaṇṇipatti)*

Winning the suit is indicated by the suitor gaining the suit, after proving his case, or after honorable discharge by the judges, and his receiving a document recording his victory or discharge. The court will commend the successful plaintiff and order him to be put in possession of what he has claimed. A document that has been rejected by the court should be torn up at once.

#### *Appeals (Punarnyāya)*

When a judgment has been given and executed, after trial in the (king's) court, it should not be reopened (Manu, IX, 233). But, according to Nārada, the case can be tried again if the vanquished party feels that the decision is unjust, and agrees to pay twice the fine inflicted. A suit can be taken up again when a defeated party urges that he has lost it through the dishonesty of witnesses or assessors (and undertakes to establish it), but the case cannot be retried if it has been lost by his own inconsistencies or conduct (p. 267). An appeal will not lie for a defendant who has run away without filing his reply. If decisions of families or groups (*kula*) do not satisfy parties, they can be taken up by the king for retrial. The appellant shall be fined twice the normal amount if he loses his appeal (p. 268). A judge is not immune from punishment if he decides unjustly. The king should rectify wrong decisions and punish those responsible for them (p. 269).

#### *Acts That Are Void*

A trial conducted outside a village, or at night or in the interior of a house, without a large audience as laid down for judicial trials, is void and any sentence passed in such conditions may be reversed or set aside. Asahāya (p. 270) notes as against "*strisu*" in this verse of Nārada (I, 43) that it implies a suit started by a woman or wife without sanction of husband, son or father is void. Night he points out, is not a proper time for trials. An agreement that runs contrary to established usage or law is void, even if it is established by evidence, e.g. one for the sale of a wife or children, or for giving away the entire property by the head of the family when there are sons (*Medhā-*

and criminal trials, with the exception that in the latter the king or the state initiates proceedings, and the decision is even quicker. It may be noted however that though the topics do not exhaust all possible cases that might need relief from courts of justice, they virtually exhaust such of them as must have been common in ancient Indian society, which had not attained the complexity, economic and social, that modern society has reached. The order of treatment also seems to follow that which indicates topics which would come up more commonly than others. But Lakṣmīdhara deals more extensively with matters that are necessary for the understanding and enforcement of the topics generally in the supplementary sections following those on the main topics (pp. 5-6).

### *Law of Debt*

*Rṇādāna*, or non-payment of debts is the first head of civil law dealt with in *smṛtis* and digests. The section begins with a verse of Nārada (p. 277) which describes the contents of the law of recovery of debt as dealing with the nature of the debts that must be repaid and need not be repaid, by whom and in what form repayment is to be made and how it should be given and how received back. He gives the familiar fanciful derivation of *Kusīda* (interest on a loan), given by Rṇhaspati as indicating an exaction from a man in difficulties, even fourfold or eightfold of the sum lent. Dr. Jolly (*Bṛhaspati*, p. 320 n.) states that that word *Kusīda* is really derived from *Ku* and *sīda* and denotes "that which adheres and cannot be easily got rid of."

A loan must never be given without adequate guarantees (*viśrambha*). It should be made on the furnishing of a surety (*pratibhū*) or a pledge (*ādhi*), or securing a deposit which is not to be used by the creditor (*bandha*) or an attested document (*lekhyā*). Money should not be lent to dependant women, slaves or minors, as such loans are not recoverable (p. 278).

### *Rates of Interest (Vṛddhi)*

The traditional rate of interest on secured loans is 15%, according to Gautama and Vasiṣṭha, and endorsed by Manu, as well as Yājñavalkya. Viśvarūpa (p. 275) says that the rate is to apply only to loans made to Brāhmaṇas. It is to be counted monthly. Vyāsa makes a distinction (p. 279) between a loan made with only a surety (*pratibhū*) and that with a pledge, and it is to be at one-sixtieth, instead of one-eightieth under the rule of Vasiṣṭha, i.e. 20 per cent per year instead of 15 per cent. The legal and moral maximum rate is stated by Manu as 2 per cent per month or 24 per cent per year. This is also the rule of Hārīta, who states that thereby the capital will be doubled in four years (p. 280). The rates rise according as the *varṇa* of the borrower descends, i.e. 2 %, 3 %, 4 % and 5 % from Brāhmaṇa to Śūdra, which may reflect variation of credit lying according to *varṇa*, as the rates are to apply only to unsecured loans (*bandham vinā*, p. 281)..Gautama

does not approve of unsecured loans, even at higher rates, for more than one year (p. 281).

### *Kinds of Interest*

They are described as of four or six classes: 'bodily interest' (*kāyikā*), periodical interest (*kālikā*), interest which grows like hair day by day (*śikhāṛddhi*), interest of enjoyment (*bhogalābha*), like using a cultivated field or pledged house rent-free, compound interest (*cakravṛddhi*), or a rate stipulated by the debtor (*kāritā*) in view of mutual needs. Where interest consists in using a pledged animal, like a cow, or horse, it is *kāyikā*. Manu rules that interest on money-loans should not exceed double the principal. In such a case the rule can be evaded in spirit by renewing the debt, and adding the earned interest to the original capital. This is allowed. Articles or commodities that are lent may be liable to variation in value and also decay. This will account for loans of grain, fruit, wool and beasts of burden being allowed to rise with interest to five times the value of the article originally. Gold and silver are treated as money in loans. It may go up to eight times the principal in loans of wines, oils and spirits. Risks govern interest rates e.g. loans to forest travellers, voyagers by sea etc. traders by sea (*samudrayānakūśalāḥ*). Workless persons who transgress habitually the rules of *varṇa* and *āśrama*, according to Visvarūpa's interpretation of Yājñavalkya, II, 38, should pay an interest of 20 per cent per month, the implication being that they are not trustworthy borrowers. Lakṣmīdhara (p. 284) takes the expression as referring only to those who are engaged in maritime trade.

Local usage must be respected in regard to maxima of interest allowed, which may according to such usage go up to even eight times the original sum borrowed (p. 285).

When a loan is repaid, the pledge deposited must be returned.

### *Special cases.*

When the price of an article that has been bought is not paid, it begins to bear interest after two months (p. 287), at 5 per cent per month. A friendly accommodation in the form of a loan bears no interest, till it is demanded back, and if not returned then, it bears an interest of 5 per cent a month (p. 287). When the lender does not ask for the return of the money lent to a person who is going out of the country without returning the loan, it begins to bear interest after a year.

When female slaves and cattle are lent, with power to use them, their offspring shall be deemed to be the interest (p. 289), i.e. the lender can take the offspring in lieu of interest.

*Cases in which Interest is not due (vṛddhiniṣedha)*

Without an express agreement, the following are deemed as not liable to payment of interest, according to Nārada : price of articles sold, deposits, fines, what has been abandoned and found by another and the winnings in a game, a gambling debt, or what has been won by a trick (*chalena*). No interest is claimable on dowries and surety amounts. Property lent but refused to be taken back by the lender bears no interest, if deposited on refusal with a third party (p. 291).

*Pledges (Ādhi)*

The pledge is termed either *ādhi* or *bandha*. It is classified in various ways according to the terms on which it is made. It may be given to be kept in custody only, or it may be given to be used or enjoyed. It may be stipulated that it will be redeemed within a stipulated period or it is agreed that the pledges retain it till the debt is repaid. In the first case there is an express or implied condition that the article pledged becomes the property of the pledgee if not redeemed on the date specified. A pledge must be carefully preserved by the pledgee in its original form; otherwise, the interest promised is forfeited and even the principal if the article is lost. Deterioration of a pledged article in quality when in pledgee's custody will entail loss of interest. There is no interest due on an enjoyed article pledged. If a pledged thing is lost, except by 'an act of God or of the King,' the pledgee must make good the loss. If a pledged article loses its value in course of time the pledger must supplement the pledge to the limit of the original value (Yājñavalkya, II, 60). A pledge must be merely kept and must not be used by force (p. 293); if this is done, the creditor loses his entire interest and must make good the loss to the pledger. A pledge to be simply kept which is used by the pledgee, leads to the forfeiture of the agreed interest. A pledgee should not insult or harass the pledger on pain of a fine (p. 295). The article pledged must be given back on repayment of the sum lent (p. 295). If the borrower is unable to find the creditor, he may pay the lent amount to the creditor's family and take back the pledge (Yājñavalkya, II, 63; p. 296). A pledge which has been made on condition of redemption by a particular date, or when the loan's value is doubled with interest, must be redeemed when the date expires, with an allowed margin of ten (Vyāsa) or fourteen (Bṛhaspati) days of grace. A pledged article, given for use, cannot be sold by the pledgee even after a long time after the agreed date for redemption (p. 298). A debt under a pledge may be repaid within a stipulated period by agreement (p. 299). When the loan is made on a pledge of a person's spiritual assets (*caritram*, e.g. the merit acquired by a bath in the Ganges, or by performing daily rites for the Fire) the borrowed amount must be returned when due along with the interest that has accrued (p. 299). When

the pledger has disappeared, the pledgee must hand over the article pledged to the King, who will authorise its sale and payment of the dues to the creditor. If there is a balance after the creditor's dues are taken it must be paid to the King, if no relations of the debtor exist. In the latter case the balance should be paid to them, according to Mādhava and Pratāparudra.

If an article is pledged to two persons, it should be his to whom it was pledged first, and the pledger is punishable 'as a thief' (p. 301). In the case of a plot of land being thus mortgaged to two persons, land should be under the man, who has been the first to take possession of it (Bṛhaspati, p. 301). The same rule applies to other landed property also (Vasiṣṭha).

If neither of the two persons to whom the article has been pledged on the same day, has taken charge of it, the pledge should be equally divided between them. When a man neither uses a pledge, nor takes it from the debtor, nor mentions it to others, any document that he may have about it is invalid, just like a document of which the executant and witnesses are dead (p. 300).

#### *Law of Surety (Pratibhūvidhi)*

Suretyship may be for appearance, trust or honesty, or payment (Yājñavalkya, II, 53). Bṛhaspati adds a fourth purpose, *viz.* delivering the assets of the debtor (*R̥ṇīdravyārpaṇa*, p. 304). Hārīta mentions a fifth object, *viz.* to remove fear (*abhaye*). If a surety for appearance of a person cannot produce him at the time and at the place agreed upon, he should pay the creditor the debt due except when the debtor is prevented from attending by an act of God or the King. A period of three fortnights will be allowed the surety to produce the creditor, beyond the date agreed upon. If the surety produces the debtor within this period, he is free from liability to pay the debt. A surety should not be harassed unnecessarily (p. 397). If he has to pay the debt, he must be allowed to pay by instalments. When the debtor is himself present, the surety must not be proceeded against (p. 307). If a surety being pressed by the creditor pays the debt he has stood surety for, the debtor should after a month pay him twice as much (p. 307). The failure of a surety for payment to pay the debt to the creditor, on the default of the debtor, by death makes his son or sons liable for the payment but the son need pay only the capital amount and not the interest. The grandson is not liable at all.

#### *Who cannot be a Surety*

Every person is not entitled or eligible to be made a surety. The list of persons who are disqualified for suretyship is given by Kātyāyana (ed. Kane, 114-116). The debtor's master, his enemy, a nominee of his master, one who is in prison, one under sentence for an offence, one accused of a crime, one holding a property jointly with either the debtor or creditor, a friend, or life-long pupils, a servant of the king, renunciates (*pravrajitāḥ*), a bankrupt, one whose

father is alive (and who is therefore master of the family estate), a wayward person and an unknown person. Husband and wife, father and son cannot be surety for each other (Yājñavalkya, II, 54).

#### *Relief for the Surety*

A surety who has had to pay on behalf of a debtor for whom he has stood surety can recover the amount he has had to pay the creditor later on from the debtor himself. Yājñavalkya (II, 56) will make the debtor pay the surety twice the amount paid by him, but he is not liable for such a payment if the payment has been made by the surety without his knowledge.

#### *Repayment of Debt (Ṛṇadāna)*

The repayment of a loan must be made on one of three occasions: on demand, if no time has been fixed for the repayment, or, if a time has been fixed on the expiry of it, or when interest has ceased by becoming equal to the principal. The son should pay the father's debt even before discharging his own, and a debt by the paternal grandfather must be paid even before the two. Whoever gets the inheritance gets this liability to pay also. The liability is in proportion to the share in inheritance (*yathāmsatath*). A tainted debt (*i.e.* one contracted for paying for drinks, lustful acts or gambling) need not be paid, nor *one* repudiated by the father himself. If the grandfather's debt is not repaid by the grandson, owing to the father being afflicted with disease, the liability is, as already pointed out, only for the ascertained (*vibhāvita*) principal and not for the interest. Such liability ceases with the third descendant *i.e.* the grandson (p. 310). In the case of an undischarged loan, the liability, if evidenced in writing, continues to the fourth and fifth generation even, according to the *Mitākṣarā* and Lakṣmīdhara (p. 311). Turning an ascetic or being abroad for more than twenty years, or suffering from leprosy or blindness or insanity makes a debtor's liability descend on his sons and grandsons even during the debtor's lifetime (*Viṣṇu*, p. 312).

A debt contracted jointly or severally by coparceners in a family shall be paid by any one of them who is amenable, but after partition of the family property they are liable only upto their shares in family heritage, if the debt has been contracted by the managing member for family purposes (p. 312). A young man, though free, if he has not attained the years of discretion, is not capable of contracting a valid debt (p. 313). Debts contracted by the head of the family for meeting sudden emergencies (*āpadkṛta*) are binding on the family (p. 314) as well as loans contracted for the expenses of the marriage of girls of the family or for funeral expenses. Manu is credited with the view that a debt contracted for the sake of the family even by persons ordinarily incompetent to do such acts, like the wife, the mother, son or pupil of the family head or even his slave are binding on the family (p. 315). The father must discharge the debts of



a son contracted by the father's own order, or for family maintenance or to meet a difficult situation (*kṛccchre*), according to Nārada (p. 315). The ordinary rule that a father is not liable to pay the son's debts is met as above, and also if he had authorised his son to borrow. A son is not liable to pay amounts due by his father as surety, fine or customs duty (p. 316). What has been promised to another woman than his wife (from lust) is not binding on a man's son. A debt due to a father's fit of rage in which he injures another is similarly not binding on the son. A wife's debt does not bind the husband or son, unless contracted for family needs. In the case of certain classes of people, whose income depends on the earnings of their wives (e.g. vintners, hunters, washermen, herdsman and sailors) their debts bind the husbands. The debt contracted by a wife along with her husband or by herself is payable by her, but according to a decision of the High Court of Bombay, only to the extent of her separate property (*strīdhana*).

Liability to pay debts goes with the right of succession. A sonless widow if desired by her dying husband to pay his debts must do so, or it must be paid by him who inherits the dead man's estate. (p. 318). He who takes the widow of a man as his partner in life (*strīgrāhī*) is liable, according to the *Viajayanli* (p. 319) to pay his debts. Debts contracted by a virgin widow who remarries (*punarbhū*) and a woman married by force to another man than the husband she is married to (*svairiṇī*) must be paid by those who take them as wives (p. 319). After the death of a man, who has left debts, the order in which the debts should be paid by him (son or collateral relation, as the case be) who gets the wealth of the deceased, or he who takes the wife of the dead man, or a son who gets no property from the father is stated thus (Yājñavalkya, II, 51; Nārada, IV, 23; Viṣṇu, VI, 29-30 and Kātyāyana, 562, 577). Whoever takes the wealth of the deceased (if he has left wealth as well as debts) must pay the debts first; next, if the deceased left no property but only debts, and if a man has taken the widow (*yoṣidgrāhī*) as his partner (either as remarried wife or as concubine) he is liable for the debts, the presumption underlying the rule being that the widow is the property of the deceased and he who takes her as a mistress is like one who gets a deceased man's assets; if the deceased has left no property or wife, but only a son, the son is liable to pay the deceased's debts, as a spiritual and legal obligation. But, if the son has wealth of his own (though not inherited from the father) and is more affluent than he who takes the widow as his mistress or wife, he takes precedence of the taker of the wife in liability to discharge the debts. Among sons, if some are unfit to inherit through physical or mental defects, the sons who are not so disqualified to inherit, are liable for the payment of the deceased man's debts. The *Vaijayanli* explains the rules of Viṣṇu thus: the word *grāha* applies to both *riktha* (property) and

*yoṣid*, and in the latter case, it means a son who is married as contrasted with one who is not. The order of liability is the *rikthāgrāha* son, the *yoṣidgrāha* son, and the son who has neither wife nor son, as the wife is the dead man's sole surviving asset. Dr. Ganganath Jha (*Hindu Law in its Sources*, I, p. 211) states that this rule refers to cases of distillers of liquor and others, who have been notorious as making money by allowing their wives to be used by other men. Asahāya (p. 320) explains the position thus: "If the woman (*i. e.* the widow) is endowed with youth and beauty and if her new lover is infatuated with love for her, he who takes her (*strihārī*) must pay the dead man's debts, as she was his wealth; but, if she is unfit to be enjoyed as a mistress (*nirbhogyā*) and is used as a servantmaid by him who takes her, and feeds her in return for work, the liability to pay the debt rests on the son and he should discharge the debt." Dr. Kane (*Hist. of D. S.*, III, p. 453) points out that the rule has been changed by legislation in Bombay by Bombay Act VII of 1866, section 4, which declares that "no person who has married a widow shall merely by reason of such marriage, be liable for the debts of any prior husband of such widow." Lakṣmīdhara (p. 322) explains the rule of Yājñavalkya (II, 51) that the last persons liable for the payment of the dead man's debts are "*rikthinaḥ*", as grandsons fit to inherit the estate (*rikthagrhaṇayogyāḥ pautrāḥ*, p. 322). Women may be taken on by other men, when their husbands have gone on long journeys and are not returning, or are idiots, or insane or afflicted with incurable disease or have joined peculiar sects (*liṅginām*) along with the wealth of such men; in such cases the *yoṣidgrāhī* should pay the debts of such persons, even if they are alive. (Kātyāyana, p. 323)

#### *Ways of Recovering Debts (Rṇodgrāhaṇavidhi)*

Recovery of a debt by the process of a suit is the regular method. But debts may be got back in other ways which though not strictly legal are still allowed by *smṛtis*. Manu (VIII, 48-49) notes that the creditor may be able to get the property of the debtor, (in return or in security for the debt) in other ways than by a law suit, *e.g.*, by moral persuasion (*dharmena*), by a trick (*chalena*) or by customary ways (*caritena*), or by force (*balena*). Bṛhaspati adds two other ways: by expostulation with the debtor (*sāmena*) and by confining the debtor in his house (*grhasamrodhanena*). Kātyāyana suggests pressure on the debtor, as by fastening his house door to prevent his getting out, or practising the custom of squatting at his door (*dhārana*), or making his wife or children do so, till the debt is repaid. Or, he may make the debtor pay off the debt by working for him. Putting pressure on debtors (who are traders, cultivators or artisans) in customary ways (*deśācāreṇa*)—*i. e.* by applying force, is another method. The debtor may be beaten (*tāḍanāt*), according to Bṛhaspati (p. 325) till he repays the debt. The restrained debtor may be allowed to have

his meals only when he finds a temporary surety to relieve him for meals, the surety remaining in custody till the return of the debtor : or the debtor may be gaoled, if he is not of respectable birth (*ārya*), and not generally trusted (p.322). The debt can be repaid by labour, if the debtor is of a lower *varṇa* than the creditor. A brāhmaṇa debtor, who is bankrupt, must be allowed to pay back the debt slowly. If such a debtor is made to do low kinds of labour, the creditor will be liable for the highest fine (p. 337) and the debtor subjected to the indignity released by order of the king (p. 327). The debtor's chattels can be sold to recover the amount lent (p. 329). A creditor must not be blamed, says Yājñavalkya, for attempts to recover his own lent money (p. 329), and a debtor who complains of such an action to the king must be fined (p. 330), one quarter of the debt amount. The rules concern *admitted* debts ; where debts are denied the only recourse is to go to the law courts (Bṛhaspati, p. 330). When a debtor wishes to have the matter taken to court, but is coerced by the creditor instead, the latter will lose the amount lent (Kātyāyana, p. 330), as in doubtful cases of debt the matter must be settled only by a suit (p. 335).

Such methods of recovery may seem harsh, but comparatively they are milder than the rules in other times and countries. In England imprisonment for debt might be prolonged for years. In India, there is a timelimit. In India, there is a timelimit. In England a judgment debtor can now be imprisoned for 42 days (Kane, III. p. 440). The methods described could not have been applied on debtors to make them repay the debts, unless supported by public opinion. In early Roman Law (XII Tables,) a debtor who defaults could be sold into slavery or be even put to death.

The high rates of interest reflect the scarcity of capital in ancient times, when the rules were laid down in smṛtis or the high profits that the utilisation of borrowed money might earn in agriculture, industry or trade. But the money-lender, especially he who lends on compound interest was deemed as degrading himself.

#### *Law of Deposits (Nikṣēpa)*

*Nikṣēpa* is the general name for deposits. It denotes what through confidence in a man's rectitude is placed in his hands by another. It may be immoveable property or movables. It may be done for safeguarding the property, when a man is leaving his place or for the purpose of deceiving the king or heirs (*Vyāsa*).

It is divided into *five* kinds *viz.* *nikṣēpa* proper or open deposit, when after checking up it is handed over to the depository himself by the depositor : *upanidhi* or sealed deposit, when a property is handed over in a sealed box, without disclosing the contents to the depository : *nyāsa* or a deposit handed

over not directly to the depository but in his absence to a son or relative, with the request that it should be delivered to the depository proper : *yācita* or borrowed article, like jewellery, and *anvāhita*, or a deposit made over by the depository to a third party for being delivered to the owner.

Yājñavalkya ( II, 67 ) rules that the rules relating to *nikṣēpa* are equally applicable to all the five kinds of deposits.

A deposit should be given back in the same manner ( *i. e.* openly or secretly ) as it was received by the depository ( Nārada, p. 340 ) : as the delivery was, so must be the return ( Manu, VI, 180 ) openly or secretly, as the case be. It must be returned in the same condition as it was in when deposited ( Bṛhaspati, p. 341 ). A deposit, open or sealed, must not be returned to a near relation of a depositor, when the latter is alive ( Manu, VIII, 185 ); for, if this man dies without handing it over to the original depository, the deposit will be lost. The depository must make good the loss of the article deposited or pay damages, unless the loss or depreciation is due to an act of God or of the King. If the depository has not taken any part of the deposit himself, but it is lost by theft, or in a flood or in a fire, the depository cannot be asked to make good the loss ( Manu, VIII, 189, p. 342 ). The depositor takes the risk if he makes the deposit knowing its chances of loss ( p. 343 ), as what is lost through the negligence of the depository must be made good by him ( Kātyāyana, p. 343 ) with interest ( p. 344 ). A deposited article must not be used by the depository, or made to earn him a profit ( Nārada, p. 344 ). Both the depository who fails or refuses to return an article deposited with him, and he who falsely claims a deposit that was not made, should both be fined twice the value of the article, and punished as thieves ( Mātsyapurāṇa, p. 345 ). It should be returned at a proper time. A depository *may be tried ex parte* when he is charged with not returning the deposit ( Manu, VIII, 182 ). Negligence leading to loss of deposit makes the depository liable to make good the loss ( p. 349 ). A borrowed article must be returned on demand, even before the time of return originally agreed upon ( p. 348 ). If a *nyāsa* in the hands of an artisan is partially damaged, the loss must be made good by him but it falls on the depositor if he delays taking delivery when asked to do so ( p. 349 ). Damage to an article handed to an artisan to be worked up must be made good, even if it is through *vis major*, or Fate ( *daivahata* ). The sin of losing or damaging a deposit is said to be equal to that of a woman who injures her husband or of a man who kills his own son ( p. 340 ). One must be careful therefore in taking charge of deposits. One is not bound to accept a deposit. A deposit ( *nikṣēpa* ) is a bailment in trust. It is not given, like *ādhi* as a security for a loan, but it is given for safe custody by reason of trust in the honesty of the depository.

The rule of Kātyāyana ( p. 349 ) that *he alone* by whose negligence the article deposited with him is lost or damaged is liable to make good the loss,

(*dāpyaḥ sa eva tat*) shows that the liability is not passed on to sons and grandsons, as in the case of the *ādhi* or a security, unless they have joined or helped in the embezzlement or loss of the article deposited. A deposit is not to be returned by sons and others (*Vivādacintāmaṇi*, p. 26).

*Sale Without Ownership (Asvāmivikrayaḥ)*

The sale of anything by one who is not its owner is termed *asvāmivikrayaḥ*. It forms a *vyavahārapada*. The four kinds of deposits, which are placed in the hands of a depositary, e.g. *nikṣēpa*, *anvāhita*, *nyāsa* and *yācila* are among those in which he has no property right. A lost article that is found by a man, or a thing which is stolen also come under this category. A gift (*dāna*) by one who is not the owner of the thing gifted away will also come under this head.

A depositary who sells a thing deposited with him is of course guilty. But one who sells lost property picked up by him, the owner of which is unknown to him, is acting in good faith.

When a thing has been sold by one who is not its owner, the real owner can obtain it from the purchaser (p. 353, *Nārada*, X, 2). In such a case, when the fact that the article that has been sold by him is not his property is brought to the notice of the seller, he must try and find the vendor from whom he had bought it. It is only by discovering and producing this vendor that he will clear himself of guilt (*kṛetuḥ śuddhiḥ tato bhavet*, p. 350). The vendor should be produced before the Court, and time for doing so will be given to him, according to the distance of the place where the vendor lives (p. 351). He should also establish that his purchase of the article from the vendor was overt. When the vendor is produced and apprehended, the seller of the article that was bought from this vendor is no longer liable (p. 351). The judge will sentence the original vendor to a fine, and order him to pay the price of the article and a fine to the purchaser, who must restore it to the real owner (p. 351). If the offending vendor is a kinsman of the owner of the lost article he will be fined 600 paṇas (*Manu*, p. 352). The buyer of the article from the vendor must establish his having bought it publicly from him, in the open market and before witnesses. Then alone will he be cleared of guilt; otherwise he will be regarded 'as a thief'. If he establishes his open purchase as above, his good faith is established and he will be discharged but he must restore the article to the real owner (p. 352).

The owner of a lost article must also establish his right to it by witnesses, who may be kinsmen, and he must prove that the article was not donated, or sold or abandoned by him (p. 353).

A gift or sale or pledge by one who is not the owner is to be rescinded (*Kātyāyana*, p. 353). He who fails to establish his title to an article indicating also the source of acquisition that has been sold by another to a third

person should be 'deemed a thief' and punished (p. 353). The buyer of the article from whom the owner claims it should establish his *bona fide* purchase of it. If his sale is also open and in good faith, he is not blameable (Viṣṇu, 354). A purchase made in secret, or for far less than the value of the article, or from a slave, or from a known rogue, or at an unusual hour will be regarded as fraudulent, and both he and the person from whom he bought it so will be punished as thieves (p. 355). The real owner of the property can get it back after paying half its price to the person who had bought it, and from whom he now recovers it, as each party must lose something for his negligence (p. 356). Purchase from an unknown vendor as well as negligence which leads to the loss of the property are both faults for which one must be made to pay (p. 356). The loss shall thus be equally borne both by the original owner and the purchaser, who establishes his overt purchase (Marīci, p. 357).

The seizure of a lost property by its owner from a stranger without notice to the 'king' is culpable and will entail a fine of 96 paṇas of copper (Yājñavalkya, II. 172).

If a relation of a rightful owner sells a property of the owner, he shall be fined 600 paṇas, and the purchaser also will be fined the same amount if he has bought it with knowledge of the facts (Manu, VIII, 198).

#### LAW OF JOINT CONCERNS (*Sambhūyasamutthānam*)

This section deals with the law of partnership. Joint concerns may be religious or secular, or even of persons engaged in acts which would be termed now criminal, like dacoities committed in adjacent states by organized bands of robbers, who bring the plunder to their own country (p. 371). In such a case what is unlawful from the standpoint of the robbed country is not regarded so in that to which the robber band belongs. The pillages may be perpetrated in enemy territory (*pararāṣṭra*) and be authorized by the state to which the pillagers belong. Such organized pillage is often by soldiers. Kātyayana assigns to the king a tenth part of the loot brought in by the gang (p. 371). Such gangs are divided into four classes, *viz.* the chief, who received four shares in ten, out of what remains after paying the king a tenth of the loot, the bravest three shares in ten, the most active two shares in ten, and the common members one tenth of what remains (p. 372). If one of the robber or raiders is taken prisoner and has to be ransomed, the amount of the ransom should be recovered from the rest in equal shares (p. 372).

#### *Sacrificial Priests*

Gautama, Āpastamba and Baudhāyana are silent on civil partnerships, and even Manu (VIII, 206-210) lays down rules only about the distribution of fees among sacrificial priests, and rules that the same principles be applied in

all joint concerns, each being paid according to the importance of his work in joint task (VIII, 211). While Manu extends the rule in a religious rite to secular partnership, Yājñavalkya (II, 265) reverses the rule and extends to sacrifices the rules of partnerships among traders, husbandmen and craftsmen.

Dr. P. V. Kane (*History of Dharmaśāstra*, III, p. 470) regards this as indicating that "complicated sacrifices requiring a large number of priests had become rare in Yājñavalkya's time and partnerships of traders and artisans had assumed great importance." The inference may be questioned, as we have numerous recorded instances of the performance of great sacrifices like the Aśvamedha in the epochs near that to which Yājñavalkya is usually assigned. From 200 B.C. to the eighteenth century many horse sacrifices were performed of which there are records (see his *History of Dharmaśāstra*, II, 1238-1239). The Sātavāhanas, Pallavas, Guptas and Bhāraṣivas claim to have done many of them, and recently Mr. T. N. Ramachandran, Joint Director-General of the Archaeological Survey of India, has discovered in Dehra Dun district sites where King Śilavarman (3rd century A.D.) performed many horse sacrifices, of which the remains have been unearthed by him.

#### *Sacrificial Priests*

A verse attributed by *Smṛticandrikā* to Manu (p. 436) states that when a number of priests (*ṛtvijaḥ*) officiate at a sacrifice (*satra*) each will do the duty assigned to him and receive the fee prescribed for it. Out of the sixteen priests who officiate in a *yāga* or *satra*, the chief four receive one-half the total amount set apart for fees (*dakṣiṇā*). They are the *hotṛ*, *brahmā*, *adhvaryu*, and *udgātṛ*. The next group of four priests (*maitrāvaruṇa*, *brāhmaṇacchamsi*, *pratiṣprasthātṛ* and *prastotṛ*) receive one-half of what the first group gets. The third group of four priests (*acchāvāka*, *neṣṭṛ*, *agnīdhra* and *pratihartṛ* receive one-third of what the group gets; and the fourth group (*grāvastotṛ*, *poṭṛ*, *netṛ* and *subrahmaṇya* get one fourth of what the first group gets. The total taken is not given by Lakṣmīdhara (as pointed out in the footnote on p. 365 *inf.*) but Medhātithi takes it as 112 and the others as 100. Over and above these the *adhvaryu* receives a chariot, the Brāhmaṇa at the kindling of the Fire a horse, the *hotṛ* also a horse and the *udgātṛ* gets the cart used to bring the *soma* purchased. The specific fees prescribed for special sacrifices like the *Rājasūya* are to be paid to the officiating priest in lieu of those prescribed, as above, e. g. two golden ornaments or mirrors (*prakāśa*).

If an officiating priest has to absent himself a substitute should be put in and paid the same fee. If an officiating priest stays away wilfully, he is to be fined 100 *paṇas* or even 200. A sacrificer who gives up an engaged priest shall also be fined similarly (pp. 367-368).

### *Joint Concerns in Business*

Br̥haspati (p. 358) advises a person to join others in a concern only if he is satisfied with their character and capacity. Each partner should contribute his share and the profits will be divided according to the shares. This is the ordinary rule, but by a special agreement one may get more than what he is entitled to according to his shares (Yājñavalkya, p. 359). The cost of working the concern must be met by each partner out of his income, as agreed upon. A partner suspected of fraud must be cleared by an ordeal (p. 360). Negligence by a partner which leads to loss must be borne by himself only, out of his share. A partner who saves by his skill the property of the concern from calamities like robbers or floods, should receive one-tenth of the gains, the remainder being divided among the partners according to their shares. A dishonest shareholder may be dismissed by the others. If a shareholder meets with a misfortune or accident, his heirs shall take his place, provided they are competent. On the death of a partner his shares must be made over to his heirs, or the king should keep them for ten years.

The king shall take a sixth part of the property of a Śūdra shareholder, whose heirs are not forthcoming, a ninth part of that of a Vaiśya, and a twelfth of a Kṣatriya, but none from that of a Brāhmaṇa, which after three years must be given away to Brāhmaṇas (p. 369). The period for which the king has to wait the arrival of a claimant for a deceased's estate is proportioned, as pointed out by Colebrooke (*Digest of Hindu Law*, 1801, II, 29) to the time needed for the heir from a distant country to appear and make his claim. Nārada holds that Dharma does not suffer by the king taking over heirless property (VI, 18).

### *Joint Undertakings in Agriculture*

Joint undertakings in agriculture should be undertaken only with equals in means, knowledge and experience. Loss due to the negligence or inability of one partner, must be made by him.

### *Joint Undertakings among Artisans*

The associates may be workers in metals, thread, wood, stone and leather. The earnings should be divided according to the work done by each. Artisans are of four grades: the apprentice (*śikṣaka*), the trained artisan (*abhiñña*), the expert (*kuśala*) and the master-craftsman (*ācāryaḥ*)—Kātyāyana (p. 371). They shall receive one, two, three and four parts respectively of the remuneration received for the work done. The headman in a group engaged in building is entitled to a double share (p. 371).

### *Artists*

Among musicians in a band, the time-keeper takes a share and a half, and the others one each (p. 371).



## RESCISSION OF GIFTS (*Dattāpradānikam*)

When a gift has been made unwisely (*asamyak*) or in an improper manner and the donor desires to resume it, it is called *dattāpradānikam*. (Nārada, VII, 1). Things may be classed as those that can be donated and those that cannot (*deya, adeya*), or given away or not given away (*datta, adatta*). Nārada notes that things that cannot be given away are of eight kinds and of only one sort that can be donated; and of things that are given away (*datta*) there are seven kinds and of those not so given twelve (or sixteen, according to a different reading) sorts.

### *What should not be given (Adeya)*

Bṛhaspati (p. 373) notes that the *eight* kinds of things that one cannot give away are : what he holds in common with others (*sāmānyam*), a son, a wife a pledge (*ādhi*) one's whole property (*sarvasvam*) a deposit held by him (*nyāsa*), what has been borrowed by him (*yācīta*), and what has already been promised to be given to another person (*pratiśruta*). *Sāmānyam* is interpreted by *Smṛticandrikā* (p. 442) as *public* property, like roads. Nārada holds that these cannot be given away even when one is in distress. The gift of a man's entire property is barred when he has progeny (*anvaye sati*, p. 374). Along with the giving away of a wife the gift to another of her property is also barred (*dārāśca taddhanam*, p. 374).

*Smṛticandrikā* (p. 442) holds that the giving away of one's entire property is barred only when he has offspring (sons, grandsons etc.) living with him jointly. If he has already given them their shares and separated from them, he may give away his entire remaining property. On the other hand, some writers (Vācaspati Miśra and *Smṛtisāra*) hold that the prohibition of giving away one's entire property is not opposed to law, as a man has absolute ownership in it, and that the prohibition is moral rather than legal. The *Mitākṣarā* states that the consent of the sons is enough for giving away the entire property, and thereby implies that the consent of grandsons is not necessary to validate it.

### *Giving away a son is in adoption.*

The prohibition is held to refer to giving away an *only* son, or the *eldest* son. Giving away a wife or son is qualified by Kātyāyana by the expression 'if they are not willing' (*anicchavaḥ*), p. 374. Vasiṣṭha (p. 375), who forbids the gift of an only son or its acceptance, explains the spiritual ground of the prohibition that the son must live to continue the line (and the offerings to ancestors).

A woman is also prohibited by him from giving away her son. Bṛhaspati excludes from the property that a man can give away what is needed for food

and clothing of the members of the family, and Kātyāyana excludes from it the family house also (p. 357). A marriage gift (dowry) cannot be given away (p. 375), without the wife's assent (p. 376). Even a promised gift need not be made if the donee is found to be a sinful or vicious man (*adharmayukta*, p. 377). Rewards promised for rescue in times of fear, or for getting a thing done, or out of gratitude generally, or wages for discovering property and rewards for saving one's life when it is in danger are all valid, but even in the last case, the gift of the whole property is invalid, even if it had been expressly promised (p. 378). Promises of gifts made in panic, or under pressure, or when drunk or insane, or in joke, or under a misapprehension need not be implemented (p. 379). A gift for an immoral purpose is invalid (p. 379). The donor and the donee in cases of invalid gift are punishable by the king. So is a bribe (*ulkoca*) which though promised need not be given, after the service for which it was promised is rendered. The recipient of a bribe and the intermediary through whom it is given are punishable but not the promiser, probably on the presumption that it was fear that made him agree to give it. Anything given for a gift in return, or to a bad man, or for an immoral purpose may be taken back (p. 379). If a gift for a pious purpose is promised, and later on it is found that the object is not correct or it will not be used or has not been used for the purpose, it can be held back, if not given, or if given, taken back. (Manu, p. 380). If a dying man has promised a gift for a religious purpose, his son must give it, if the father dies before it is given away. This is held to contain the idea of an inchoate Will. A gift promised to a Brāhman and not made will be enforced by a fine (Kātyāyana, p. 377).

He who accepts what should not be a gift and he who makes it will both be punished by the king (Nārada, p. 380). If a man promises a gift and does not make it, the king should fine him a *suvarṇa* (*Matsyapurāṇa*, p. 377). Hārīta (p. 377) holds that a gift has a legal and spiritual backing, and he who having promised a gift does not make it goes to different hells and is reborn as an animal. What has been promised to a worker as wage, (*bhṛtī*) or out of satisfaction (*tuṣṭyā*) or to bards for the pleasure given by their songs, or to merchants, or to a woman as *śulka*, or to a benefactor in gratitude *must* be given. Gifts to parents, friends, suppliants disabled and helpless persons, eminent and virtuous persons and benefactors, are fruitful (*saphalam*) of spiritual gain. They must be made (p. 378).

#### LAW OF WAGES (*Bhṛtividhi*)

Three divisions of the law relating to wages are followed in *smṛtis*, each forming a head of *vyavahāra*. These are (1) the law relating to wages (*bhṛtividhiḥ*) or remuneration for labour, (2) breach by workmen or employee of

contract of service (*abhyupetya asuśrūṣā*, (3) disputes between the owner of cattle and herdsmen (*svāmipālavivāda*).

Servants or servitors (*karmakarāḥ*) are free workers, while slaves (*dāsāḥ*) are not. The former are divided into four classes and the latter into fifteen. Servants may also be classified in many ways according to their caste and occupation (*Brhaspati*, p. 382); but the four-fold division of those who serve deals with the chief of them. One may serve to attain sacred knowledge (*vidyā*), or knowledge of a skilled craft (*viññāna*), or be a mere worker or a common wage earner. Each class is subdivided into sections according to differences of occupation and their requirements. The typical members of the four classes are a student under a *guru*, studying the Vedas, an apprentice learning a trade or craft under a master, a hired worker, and a supervisor of workers (*adhikarmakṛt*).

The relations between teacher (*guru*) and pupil, during the long term of pupillage have been dealt with in the *Brahmacārikāṇḍa*. The pupil has to reside with the *guru*, as a member of his family, pay obedience to him, and diligently attend on him, as well as on the *guru's* wife and sons. After completing his studies, he must make his *gurudakṣiṇā*, get the preceptors permission to leave, and leave.

Crafts and arts (goldsmith's work or dancing for example) are termed, in contrast with *vidyā* (Vedic learning), *viññāna* (skill). The student in this case too should live with his teacher as a member of his household, for a stipulated period, during which he will be trained in his work. The master craftsman will feed the pupil (apprentice) and teach him. He will be treated like a son, and not be put to any work other than that for which he is being trained (*Nārada*, p. 384). If the master does not teach the apprentice his craft but exacts other work from him, he is liable to a fine of the first degree, and the pupil will be allowed to go away from him. If the apprentice forsakes or disobeys a good master, he will be compelled to reside and obey, and may be flogged or detained (p. 384). Even when his training is finished, the pupil must remain for the full stipulated period with the master, and his earnings will go to the master, while he will work without wages (*bhṛti*). When the period of stipulated training is finished, the pupil or apprentice will leave his master after liberally rewarding him and showing him honour, according to his capacity (p. 385).

The servitor, who works for wages (*arthabhṛt*) may be engaged for wages payable by days or months, *i. e.* by time, or for a share of the gains of the labour. The highest worker is a skilled worker with tools, the next is a cultivator (*kṛṣivāla*), and the last a mere carrier of burdens. The division.

is based on skill. The last class is to do household work. The second class consists of agricultural workers, cowherds etc, who are remunerated from the harvest or milk gained from the cattle.

The highest type of servitor is he who is to do the work of the manager of the property, and is termed *kauṭumbika*. The four are to work on "pure", i.e. non-degrading work. Scavenging, shampooing the private parts of the master, removing leavings of food etc. should be done by slaves or the children of female slaves (p. 387).

### *Classification of Slaves*

A slave may be one purchased as such, or born a slave, or got as a gift from an owner or bought, or inherited along with family property, or admitted to servitude in return for food during a famine, or pledged by a former owner, or reduced to slavery for debt or become a slave by voluntary surrender to a master by offer to be a slave, or one enslaved for a stipulated period, or self-sold or become a slave for maintenance, or the son of his connection with a female slave. An apostate from ascetic life (*pravrajyāvasitaḥ*) becomes the slave of the King (Nārada, p. 389.). He is entitled to emancipation neither in this life nor *mokṣa* (release) after death. Lakṣmīdhara cites without comment the cryptic verse of Manu (VIII. 414) stating that the Śūdra is not released from servitude though released by his master from it. As pointed out in footnote on p. 389 this verse is held by Medhātithi to be merely declamatory (*arthavāda*) as even a Śūdra slave can be emancipated. The Śūdra belongs to one of the four *varṇas* and is an Aryan (see my INDIAN CAMERALISM, 1949; p. 84), and, according to Kauṭilya "no Aryan is born a slave". The duty of service is hereditary for the Śūdra and the verse simply means that no Śūdra can give up this duty.

The penalty for a Kṣatriya or Vaiśya ascetic, who forsakes his order is servitude (*dāsaśva*), while for the Brāhmaṇa ascetic who forsakes his order, the penalty is expulsion from the country after being marked with a dog's foot branded on his forehead (p. 390).

### *Emancipation from Slavery*

Persons sold as slaves by robbers who have captured them will be set free by the King (p. 391). A slave who saves his master's life at the peril of his own is set free automatically and gets a son's share of the estate (p. 391). One reduced to slavery in a famine is set free by the presentation of a pair of oxen. One who has voluntarily become a slave for maintenance is freed by giving it up. One enslaved for sex-intercourse with a slave girl is released on separation from her (p. 391). A slave woman, who becomes pregnant by intercourse with her master, is set free when she gives birth to a child and along with it.

The procedure in emancipation is this. The master takes a pot of water from the shoulder of the slave, sprinkles the water on the head of the slave, and smashes the pot. Besides water the pot must contain grain (unhusked) and flowers. He should declare three times that the slave is freed. The slave should then proceed eastwards.

The wealth of a slave belongs to his master, who is however not entitled to the price paid for turning him into a slave (p. 394). A free woman becomes a slave by marrying one (p. 395). Slavery is not synonymous (p. 396) with *prātilomya* (inverse order of marriage). A Brāhmaṇa cannot be a slave (p. 396). The highest penalty should be imposed on him who makes one of a superior *varṇa* do a slave's degrading work (Viṣṇu, p. 398).

A person who buys a Brāhmaṇa woman or sells her as a slave will be compelled to annul the transaction and be fined. If a respectable woman seeks shelter under a man, and he sells her as a slave to another, he will be fined and the transaction annulled (p. 398). If a man enjoys a free woman, either his child's nurse or his servant's wife as if she were a slave woman, he must suffer the first emercement (p. 399). If a solvent man sells a slave woman, whom he has enjoyed (*bhuktām*), when she is unwilling to be sold, he should be fined two-hundred (Kātyāyana p. 399)

Kātyāyana points out (p. 396) that members of the four *varṇas* can be slaves only of those of *varṇas* higher than their own, or of their own *varṇa* and not of those below them in *varṇa*. This refers to the different ways in which a person might bring himself into servitude. A well-to-do Brāhmaṇa may support men of the next two *varṇas* when they are destitute and have no means of living, but they must be put only to suitable tasks, and if he puts them to do low work (like cleansing the house or latrines) the king should impose on him a fine of 600 paṇas (p. 398).

#### *Non-payment of Wages (Velanasyānapākriyā).*

A servitor should be paid by his master or employer, as agreed upon beforehand, either at the beginning of the month (*i.e.* in advance), or in the middle of the month or when the month is over. The wages may be fixed beforehand, but when not so settled the servant of a trader or of the owner of cattle who engages the servitor as herdsman, and a field labourer shall get a tenth part respectively of the milk yielded by the cows or harvested grain respectively. Yājñavalkya (II, 196) correctly rules that wages should depend upon the work turned out, and when the work turned out is either late or imperfect or incomplete, the amount to be given as wage is within the discretion of the employer. The customary rule, which is embodied in *smṛti*, is that an agricultural labourer, a ploughman (*siravāhaka*) should get one-fifth of the grain, if he is fed also,

and one-third of it otherwise, should a definite engagement regarding wages not have been made (Bṛhaspati, p. 401). In earlier days a ploughman who ran away was asked to be thrashed (Āpastamba, p. 402). The practice must have disappeared later. An agricultural labourer is responsible for the safe custody of the implements he handles (Nārada, p. 402). A labourer who fails to do his work, though able to do it, forfeits his wage, and has to pay to the king a fine of twice the wage (Bṛhaspati, p. 403). A workman can be legally compelled to do the work undertaken, and paid the wage for it agreed on. A workman who leaves his work unfinished can be fined and compelled to complete the task (p. 404). He can also be fined eight *kṛṣṇālas*. Wages in full cannot be claimed for incomplete work. A workman who stops work in the middle of a stipulated period can be compelled to finish it, unless he desisted from a fault of the employer (p. 405). If at fault he can be made to complete the work and also pay a fine of 100 paṇas to the king. A wage-earner is entitled to the full wage agreed upon when engaged, if he is sent away before the work is finished. The employer in that case will be fined 100 paṇas. A servant is to pay the full value of what is lost by his inattention and twice the amount if the loss is due to gross negligence or malicious intent. He has not to make good losses by robbery, or by 'acts of God or the King' (p. 405).

He, who, having agreed to do for pay a task of art or science (*śilpa, vidyā*) is paid the wage therefore, but fails to perform his task, will be fined the full amount (p. 406) promised.

As regards the hire of conveyances or animals used for carrying persons or articles, merchandise damaged or lost by the carrier's fault has to be made good by him (p. 405), but not if they are due to God or the king (p. 406). A trader who hires a carrier but drops him must pay him a fourth of the promised hire (p. 407), and the whole hire, if after using the conveyance, he dismisses it halfway. A carrier who abandons the merchandise shall forfeit a sixth part of his hire. When the conveyance is stopped halfway and robbed of its contents, the carrier should get proportionate hire according to the distance covered (p. 407). The same rule applies if the articles carried are confiscated on the way (p. 407).

The employer is responsible for the health of the person hired. He who abandons on the way a sick or exhausted (*śrānta*) employee, without remaining with him for three days and taking care of him shall pay the first amercement.

Failure by an employer to pay the stipulated wage will make the king compel its payment and punish the employer (p. 408).

#### *Laws relating to Prostitutes (Panyastrividhiḥ)*

Prostitutes were a recognized professional class, and were even regarded as forming a 'fifth caste'. In Mauryan India they were the property of the

king. Kauṭilya (p. 123) mentions a 'Superintendent of Prostitutes,' appointed by the king. Nārada is cited by Lakṣmīdhara (p. 410) for a rule making the Chief Prostitute (veśyāḥ pradhānā) decide disputes relating to them. Kauṭilya states that a prostitute was to give the king every month twice the amount earned by her on a day. Smṛtis and Purāṇas treat the prostitute as a social institution and frame rules for their wages.

A prostitute who has received her hire but refuses to attend on the payer will have to pay twice the amount to him, and an equal amount to the king, unless she is unable to attend on him through illness, weariness, or fear (p. 408). Unnatural intercourse with a prostitute or hurting her during intercourse makes the paramour liable for the payment of *eight* times the promised fee, and an equal amount as a fine to the king (p. 409). A fine of a gold *māṣa* will have to be paid by the go-between who engages a prostitute for one person and takes her to a different man. Failure to pay the promised fee will make a man liable to pay her twice the amount and a fine equal to this to the king (p. 410). When several persons use a woman, each will have to pay her a double fee, and to the King also the same (p. 410).

#### *Payments for Use of Houses etc. (Grhādibhāṭakavidhiḥ)*

The rent for the use of a house or ground is treated like wages. If one has built a house himself on a ground belonging to another, paying rent (for the ground) to the owner, he may take away the materials out of which the house was built, when he vacates it (Nārada, p. 411). But if he has lived there without the owner's permission and without paying him rent, he cannot do this (ib.). This is also the rule if a man gets a ground on which he builds the house through friendly consideration of the owner *i.e.* without rent. Hiring a house or a water-vessel or such things from the owner will make the hirer restore them to the owner and pay rent for them till he leaves (p. 411). Damage done to articles taken on hire must be made good by the hirer (Nārada, p. 412).

He who hires a cart and goes away after using it but without paying its hire (*bhāṭa*), when he has covered only part of the road he had undertaken to take it over, will have to pay the *full* hire (*Vṛddhamanu*, p. 412). The same rule applies to hiring animals for conveyance—*e.g.* elephants, oxen, horses, mules or camels—and the hirer will have to pay the full hire, even if they have been used only for part of the road (Kātyāyana, p. 412).

#### *Owner and Keeper of Cattle*

Disputes between the owner of cattle and the persons he employs to look after the cattle are treated in the last section on Wages. It is termed *svāmi-pālavinivāda*.

The wages of the herdsman are customary. A cowherd may be paid money or milk, the latter being more usual. He gets the milk of the best cow, if he gets nothing else as remuneration. For grazing and lending a hundred cows for a year, he will get a heifer as fee ; for tending two hundred cows, he will get a milch cow. He will also be allowed to milk for his own use all cows every eighth day ( p. 413). Br̥haspati rules that he gets the milk of one cow every eighth day. Āpastamba enunciates an old rule that a herdsman who neglects his herd is to be flogged ( p. 414). He is bound to bring the cows back home in the evening in good condition after they have grazed. If any have been seized ( by wolves ) or lost ( as by falling into pits ), through his negligence, he must pay their value. ( Yājñavalkya, II, 164 ) He is not responsible, if after notifying the danger to the owner, some of the cattle are taken away by robbers ( p. 415). In cases of confusion as when the village is over-run and also the district, the herdsman is not responsible for loss of cattle in his charge ( Vyāsa, p. 415). The herdsman should, as far as possible protect the cattle from insects, snakes, tigers and robbers. Negligence on his part makes him liable to pay the price of the lost animal. ( p. 416 ) and a fine of 13½ paṇas. Milking cattle without permission ( and appropriating the milk ) makes a herdsman liable to a fine of 25 kārṣāpaṇas.

Goats attacked by wolves ( as well as sheep ) and killed will make the herdsman responsible for their loss, unless he has honestly tried to repel the attack. Sudden attacks by wolves will not make him responsible for loss.

When cattle die in the forest, naturally or by attacks, the herdsman should take their ears, tails, hides and skin to the owner, obviously to prove that they died, and were not clandestinely sold away ( p. 418 ).

#### *Transgression of Agreements ( Samvid-vyatikramah )*

The expression *samvid-vyatikrama* is used by Manu ( VIII, 5 ) in enumerating *vyavahārapādāḥ*, and again when he had dealt with non-payment of wages and proceeds to the next topic he describes it as that which deals with those who break *samaya* ( *samayabhedinah* ) ( VIII, 218 ), and Kullūka makes *samaya* the equivalent of *samvid* in explaining the verse. *Samaya* means ' convention ' and *samvid* is ' compact '. The former in practice ( in corporate bodies ) leads to the latter. Yājñavalkya ( I, 61 ) uses *samaya* in the sense of ' agreement, ' which must be the basis of both. Nārada ( p. 419 ) refers to the rules made by agreement among themselves by heretics as well as orthodox followers of the Vedas as *samayāḥ*. An agreement among members of a group is termed *samayakriyā* ( p. 423 ).

The formation of groups of persons with common interests or traditions or outlook is desirable for their safe existence and progress. It is for this reason that the king is enjoined, as his duty, to protect their rules and practices, so long



as they are not against Dharma (*avirodhena dharmasya*, p. 423 or *nijadharmā-virodhena*, p. 422), and to punish those among groups who violate their agreement or create disorder or disunion. Such groups are also necessary to safeguard their members' interests or of those of the community especially in times of peril, as for instance in an enemy attack or invasion, or attacks (*bādhā*) by robbers (p. 420). Groups make better progress than individuals. The recognition of this principle is behind the rules enjoining the king to approve of the constitution and working of even associations of renunciates who have given up their vows (*pākhaṇḍāḥ*) or (to take the interpretation of the *Mitākṣarā*) those who do not accept the authority of the Vedas like the Jainas and Bauddhas. Nārada mentions among the groups which the king must recognize, guide and control, guilds of traders and corporations, unions of soldiers (*vrāta*), and unions of kinsmen, showing that what is desired is their efficiency and strength and not conformity to one religious standard. The king must maintain in each group its settled or agreed usages and rules, including the modes of their working and constitution. The general principle that must be enforced is that whatever are the agreed rules of a corporations must be strictly followed and enforced. In addition, they must obey the commands of the king (p- 422)

Examples of the compacts (*samaya*) of a corporation are given on p. 423. They include agreements to build temples, halls of assembly, refreshment rooms, and to dig tanks, arrange for sacrifices, or mutual defence, and for poor relief. They should be implemented by the association and enforced by the king. One who refuses to carry out the agreement of the group, while remaining a member, will be punished by the king with the forfeiture of his whole property, or banishment, or, in milder cases, by a fine of 24 suvarṇas (p. 423). Changes in their constitution or rules (*bheda*) require royal approval.

In an association there should be a leader (*kāryacintaka*) and committees of five or seven members (p. 420), who should be chosen for their capacity, experience and character, as well as their ability to speak for the good of the *samūha*. People who sow dissension in corporate bodies should be subject to specially severe punishment by the king (p. 424). Among offences that the king should punish are misuse of the group's funds, their misappropriation (for which banishment is the penalty advised), or wastes of its resources (*ganadra-vyavināśakah*, p. 425). Commensality among the members of the union must be enforced (*Kātyāyana*, p. 426).

After meetings of union councils, its members should be sent back after honours being conferred on them by the king, as they are public workers.

The incomings of any member should go into the common stock, to be divided among all members; or, when it is not considerable, it may be used for charity. Debts incurred by managing members, as if for the union, but used

up by themselves must be repaid by them to the group. A person who joins the group after it has been long in existence is equally entitled to the privileges of membership as older members. One who has resigned from the group loses them.<sup>1</sup>

### *Repentance of Purchase and Sale*

After a sale is effected, it may happen that both the seller and the purchaser, or either may be dissatisfied, and may want back the article or the sale-price paid respectively. The rules are allied and Manu (VIII, 232) treats both under one head, 'repentance of sale and purchase' (*kṛayavikṛayānuśaya*). Nārada splits the two. Lakṣmīdhara follows Nārada in this respect and has separate sections for each.

#### *A. Non-delivery of goods sold (pp. 429-434)*

Goods sold are of two kinds: moveable and immovable, described as *jangama* and *sthāvara*. Both are saleable and so termed *paṇya*. Sale and purchase may be in six ways: by tale (*gaṇitam*), by weight (*tulitam*), by measure (*meyam*), by workmanship (*kriyayā*), by beauty (*rūpataḥ*) or by lustre (*śriyā*). In respect of each of these there may arise dissatisfaction in buyer and seller.

If a man sells immovable property and does not make a delivery to the buyer, he shall have to pay its produce value, when it is handed over to the buyer, from what it may have earned in the interval between sale and delivery. If there has been a fall in this interval, the buyer must get the article and the difference in price. In the case of movables the variation in price may be commoner.

A seller can be compelled by the king to deliver the sold article to the purchaser, with interest, if the price has already been paid, and on default he may also be fined by the king 100 paṇas. Manu and others allow a period of ten days within which the transaction may be revoked (Manu, VIII 223, p. 430). This rule will apply to cases in which the article does not deteriorate in the interval of the days of grace. The deterioration may be in quantity, quality and price. Nārada limits returnability—without deduction—to one made the same day (p. 430). If in the interval between sale and delivery the article

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<sup>1</sup> "It does credit to ancient writers on Dharmaśāstra that they were tolerant enough to require the king, whatever his own religious persuasion might be, to honour and enforce the usages of even heretics among themselves. The only requirement was that the enforcement of the usages must not be opposed to the interests of the country or capital and must not cause commotion and must not be plainly immoral." (P. V. Kane, *History of Dharmaśāstra*, III, p. 488).

deteriorates, or is destroyed by fire or damaged, the loss shall be the seller's ( p. 431 ). A buyer may give an earnest money when the purchase is made, the balance to be paid on delivery of the article ; but if no specific date for delivery has also been settled also, and the buyer refuses to accept delivery, he is to blame ( p. 433 ). If the buyer refuses the article, after it was sold to him, and it is sold to another, any loss that may accrue to the seller thereby must be borne by him alone ( Yājñavalkya, II, 255 ). Fraud in sale is punishable by a fine of twice the value of the article sold, and payment of twice the sale price to the buyer ( p. 432 ). The same penalty will fall on a dishonest seller who conceals from the buyer a blemish in the article sold. Sales or purchases by persons, who are drunk, or insane or in terror or hardly themselves through nervousness are void. The seller who sells a thing to one person, and delivers it to another, must pay double its price to the buyer and an equal amount as a fine to the king for his dishonesty. Nārada exhorts traders to fix a just price on their commodities, according to place and time, and desist from dishonest practices ( p. 434 ).

#### *Repentance of Purchase ( Krītvānuśayaḥ )*

Rescission of purchase occurs when a buyer repents of his action and wants to get back the price paid. He may think he has made a foolish bargain. If he returns it to the vendor on the day of purchase, in an undamaged condition, he can get back the price. If the return is made on the second or third days, he will have a loss of one-thirtieth and one-fifteenth of the price. After the third day the purchaser must keep the article ( p. 435 ). Having bought a milch cow and the like, if a buyer repents of it, he may return it and lose a tenth part of its price. This is the rule if the article does not deteriorate by use. If it is one that does, then the penalty is one-sixth the price. Caṇḍeśvara ( *Vivādaratnākara* p. 197 ) holds that the lower penalty is to be met when the rescission is sought *before* taking delivery of the thing sold. A merchant is expected to know how vendible articles are valued. He must not therefore ask for the rescission of a purchase made by him ( p. 436 ). A buyer must always inspect the thing to be bought. In the case of brick, wood, hides, grain, cloth and wines the inspection before purchase must be made at once. Milch cows can be tested for ten days, beasts of burden for five, and precious stones for seven. They are returnable within these periods ; male slaves for a fortnight, and female slaves for a month, iron and cloths in one day. Discovery of blemish within these periods makes the article returnable. Ragged and soiled clothing are not returnable even if they were in that condition when bought ( p. 437 ).

#### *Boundary Disputes ( Sīmāvivādaḥ )*

Lakṣmidhara begins the section on " boundary disputes " with a citation from Bṛhaspati ( p. 438 ) which states that the section of *sīmāvivāda* deals with

the laws concerning boundaries of villages, fields, houses and so forth (*ādīnām*). The extension to subjects which have some relation to boundaries brings under this heading many questions of proprietary right, including easements and rights and liabilities of owners of properties by *atideśa*, i.e. analogy or extended application. A sub-section of this chapter is therefore headed "*tasyātideśah*" (p. 452).

Kātyāyana states that the six causes of disputes about land are based on claims for more land than one holds, contention that another is entitled to less land than he holds, claim to a share in land (on other grounds than inheritance), total denial of a share in land to another, seizing a land when it has not till then been in possession, and delimitation of a boundary (p. 438). Nārada defines it as dispute in regard to land in which questions about dikes (*setu*), boundaries of fields (*keḍāra*), a boundary (*maryādā*), tilled land (*kr̥ṣṭa*) and fallow land or waste (*akṛ̥ṣṭa*) have to be settled. In every one of these cases boundaries have to be settled, and so disputes concerning them can be brought within boundary disputes. Disputes between villages are usually only as regards their boundaries. The determination of such boundaries is thus a State duty, and may have to be done when the villages are first constituted or when disputes crop up later.

Boundaries or boundary marks, according to Nārada (p. 448), are those marked by tall trees like flag staffs, visible from a distance (*dhvajīni*), river boundaries (*sandhinī*), boundaries indicated by concealed objects (*naidhāni*) those settled by agreement of parties, and therefore free from apprehension (*bhayavarjitā*) and those created by royal command (*rājāsāsanānīlā*). Determination of boundaries by the king may take place when a village is founded or formed, or after a dispute, which is finally decided by the king or by his officers.

Manu advises the planting of tall and big tress (named in his list) and clumps of bamboos on boundaries to mark them. They are termed boundary trees (*simāvrkṣāḥ*). Raised mounds, thickets and reeds are also suggested to mark bounds. At the junction of boundaries the construction of tanks, wells, cisterns, fountains and temples is also advised (p. 439). Channels and rivers also can mark boundaries of adjoining villages.

For marking boundaries, whether of houses or villages, one of the suggested ways is to put some imperishable objects (like bones, ashes, hair, chaff, cinders, bricks, potsherds, pebbles and sand) underground. When disputes arise they can be dug up as proof (p. 440). Young villagers should be made to know of their location, so that their knowledge of them when they get old may be helpful in settlement of disputes; and such knowledge might pass from generation to

generation. When the inspection of such signs does not finalise a settlement, recourse must be had to evidence of witnesses (Manu, VIII, 253, p. 442). Continued possession or enjoyment (*bhoga*) is as good a proof as that testified to by witnesses.

River boundaries have a defect; they may change their courses. They may carry away some land from a property, and thereby diminish its area, and a property on the other side of the river may get an accretion (Bṛhaspati, pp. 450-451). Land abandoned by a river and accruing to land belonging to a man will be his, by a change in its course. A river boundary that is accepted as demarcating two villages should never be given up. The loss or gain a river causes is regarded as due to mere luck. When a piece of cultivated land is intersected by a change in the river's course, the former owner gets the produce or crops, but the land that has been added to a village will belong to it. This is the view of *Smṛticandrikā*, (p. 549). Caṇḍeśvara (p. 217) thinks that the accretion still continues to belong to the original village.

#### *Decision of Disputes by Evidence of Witnesses*

The relevant witnesses are neighbours, aged villagers, permanent residents of the village (*śāmantāḥ*) fowlers, fishermen and, men who had seen the boundary erected (*vyddhāḥ*) and who can bear witness to the payment of taxes by the occupant (p. 448). The witnesses should be examined in the presence of a crowd of villagers and of the contestants. They should depose after putting clods of earth on their heads, and flowers, and clad in red clothes, and after being put on oath they should depose and indicate the boundaries. Even a single witness, who is trustworthy, can by his deposition in the above way, settle the dispute (p. 445). Nearest neighbours are to be preferred as witnesses to those who live at a distance. Other rites to be undergone by the witnesses show that they were to impress on them the risk of divine punishment if they depose falsely.

#### *Extension of the Principle (atideśa)*

The disputes about boundaries between villages shall be decided by the king. The kingdom should be divided into areas containing ten, hundred and a thousand villages, and the boundaries of these also should be laid down by the king, proceeding by marks. The same rule applies to disputes as to boundaries of houses, gardens, warehouses etc. (p. 452).

Easementary rights are enunciated, as evolved from boundary settlement principles. Windows, drains, 'pegs' or balconies projecting from a wall should not be interfered with, if they have long been in existence (p. 453). Neighbours should not interfere with the foundations of walls, or drains, balconies or windows of houses that adjoin their's, under penalty of a fine. But if windows or 'pegs'

have not been there before, they cannot be newly added by a house owner, so as to interfere with a neighbouring house. Windows that invade a neighbour's privacy are prohibited (p. 453). A drain which will carry water into a neighbour's house is forbidden. A fire-place, latrine and a dung-heap must not be made close to a neighbour's residence; it should be at least two cubits from its walls (p. 454).

Tanks and roads should not be defiled by ordure. He who drops filth on them, except under extreme necessity, will be fined two *kāṣāpaṇas* (p. 455), and he must himself remove the filth. A child, a pregnant woman and one in extreme necessity (*āpādgataḥ*) will be excused for contravening this rule (Manu, IX, 283). The defilement with ordure of holy waters, tanks or river ghats will entail the first amercement (p. 455).

A cross road (*catuṣpatha*), a temple, a street, or a public highway should not be obstructed by pits for keeping ordure, or by aqueducts, or drains, or projecting terraces or roofs, and the like. (*Kātyāyana*, p. 554). A pathway by which men and cattle pass must not be obstructed by any one. On streets, three feet of space must be left unbuilt on the sides of houses. A temple on a road must not be obstructed.

A destroyer of landmarks which indicate boundaries should be made to pay the highest amercement and remake the landmarks (p. 456). For breaking up a landmark, for encroaching beyond a boundary and for usurping lands the amercements are respectively the lowest, highest and middlemost (p. 456).

If a tree in one's garden stretches its branches beyond his land, it still belongs to him in whose land it has its roots. When trees mark the boundaries of two fields their fruit should be evenly divided between the owners of the two fields.

#### *Dykes (Setu).*

The erection of a dyke in another's field is not culpable, as the advantages flowing from it are greater than the small inconveniences caused. A dyke which will do good should not be obstructed when being built. No grain is produced without water but excess of water impedes grain growth. So, there are two classes of dykes, *viz.*, for storing water (embankment dyke) and for draining away surplus water (*khaya*).

#### *Tilled and Untilled Land (Vikṣṭākṛṣṭa)*

When land lies fallow because its owner is unable to cultivate it, or has gone away to another country, another man may cultivate it, but he must restore it to the owner when he returns and pays the cost of the improvements made by the cultivator (p. 459). The actual cultivator of such land shall enjoy it for

eight years only, paying the owner one-eighth the produce every year (Kātyāyana, p. 459).

A field and a house enjoyed for three generations by a man and his ancestors cannot be taken away from him by force, except when the king wills it (p. 459). But let not the king do so, as a householder's house and field are the two foundations of a man's life (Nārada, p. 460). When one neglects to cultivate arable land ('land that has been broken up by the plough'), it may be cultivated by another, who will pay part of the produce to the owner. The lessee of a field who neglects to cultivate it must still pay its owner the value of the average yield from it (Bṛhaspati, p. 460). He who neither cultivates his land himself nor allows another to do so, after taking it on lease, must pay the value of its yield to the owner and an equal amount as a fine to the king. This is to prevent land lying idle.

#### *Protection of Crops (Sasyarakṣā)*

Pasture land can be provided by the desire of the village or of the king, and a space of 100 *dhanus* must be left for pasture between village and village; of two hundred for a small town, and four hundred for a city (p. 461).

An open space one-hundred *dhanus* in width should be reserved for pasture in a village and thrice the space in a town. If cattle damage unfenced crops, the king shall punish their owner (p. 462). A herdsman is not responsible for damage done to an unfenced field by cattle in his charge (Nārada). If cattle stray in to a field without being made to do so by their owner, he is not responsible for the damage. Wilful trespass is punishable. A herdsman is punishable who allows his cattle to enter and damage crops in a fenced field (p. 463). Compensation claimed for crops eaten by cows is not 'meritorious': the claimant's ancestors will refuse to partake of his offerings (Uśanas, p. 463).

A good, high fence should be put by the owner on the side of a field that faces a road (p. 463). Animals taste sweet crops (p. 464).

#### *Penalty for destroying Crops (Sasyghātadaṇḍa)*

A cow trespassing into a field by day will lead to a fine of one and one-fourth *paṇa*, (*sapāda*), and for night trespass by a cow the fine is 5 *māṣas*. The owner of trespassing cattle shall pay a *paṇa*, half-a-*paṇa* and one-fourth *paṇa* respectively for each cow, buffalo, or sheep or goat that trespasses (p. 464). Similar amounts payable to owners are indicated by other *smṛtis*. An owner must be fully compensated by the owner whose cattle completely uproot the crops of the former. If the animals sit on the field after eating up the crops, the penalty is double the former (p. 466). The herdsman will be beaten (p. 466). The damage done by the cattle should be made good by their owner to the owner of the field, after being assessed by a third person (p. 467).

### *Immunity from Penalty (adāṇḍyāḥ)*

Elephants, horses and mules are protectors of the subjects (*prajāpālāḥ*); they are immune from penalty for destroying crops (p. 469). So are cows within ten days of calving, dedicated bulls, or dedicated goats, a cow that has strayed away from its herd (*āgantukā gauḥ*), and all of them in times of festivity (*utsave*), if they take part in it, or during *śrāddhas*.

Nārada (p. 469) forbids the beating of trespassing cattle but Bṛhaspati allows it (p. 470).

### LAW OF CRIMES

The term *sāhasa*, derived from *sahas*, 'force', is used in both a comprehensive and in a narrow sense. In the former, it includes, five sections of criminal law, *viz.*, abuse and defamation (*vākpāruṣya* and *daṇḍapāruṣya*), theft (*steya*), adultery and allied offences (*stṛisamgrahaṇam*) and crimes of violence proper (*sāhasa*). Robbery, being open and violent, is *sāhasa*, while theft (*steya*) which means the *secret* appropriation of another's property is unviolent. Bṛhaspati and Nārada state that *sāhasa* is of *four* kinds (or *five*): manslaughter (*manuṣyamāraṇam*), theft (*cauryam*), adultery (*paradārābhimarśanam*), and the two sorts of *pāruṣya*, *viz.*, insult and defamation. It is defined as what is done by force (*sahasā*), and *sahas* (p. 556) is equated in meaning with *bala* (strength, force). But though this comprehensive character is given to the term *sāhasa*, the other four topics, besides crimes of violence, like manslaughter, are treated under different heads. It is noteworthy that Lakṣmīdhara begins his treatment of the first of the divisions of *sāhasa*, *viz.*, *vākpāruṣya*, without citing the comprehensive definition of Nārada, which he cites only in a later section on *sāhasa* proper (section 71, p. 556). Under theft a distinction is made between secret theft (*steya*) and robbery in which violence is an element, and is therefore brought under *sāhasa*. There is some overlapping naturally between the offences, as killing may be by violence or by poison, but both are treated under *sāhasa*. The distinctions are due mainly to differentiation of involved criminality, in the offences and their appropriate punishments of varying severity.

### *Abuse and Defamation (Vākpāruṣya)*

*Pāruṣya* means harshness. *Vākpāruṣya* is defined by Nārada (p. 471) as an offensive statement couched in foul and violent language (*nyāyigra samhitam*); in regard to the native country, caste, family and so forth, about another person. A man may be insulted by saying that men of his native area 'are by nature fond of creating trouble,' or of his *varṇa* have bad qualities (as by saying to a Brāhmaṇa that 'Brāhmaṇas are excessively greedy', or of his groups or family (as by saying that 'the men of the *gotra* of Viśvāmitra are cruel by



nature). The harshness of the utterance must be evident, and there may be exclamatory interjections showing threats, like *hum*. The insulting address may be harsh (*niṣṭhura*), vulgarly worded (*aślīla*) or virulent or biting (*tīvra*). The harsh expression may be coupled with reproaches; the 'vulgar' may be in indecent language; and the 'virulent' may suggest acts that would make a man an outcaste (*patita*). The gradation is designed to indicate the gravity of the offence and correspondingly severe penalties (p. 471). The words may be accompanied by indecent gestures, like the indication of genitals (p. 472). Under the last head are words that impute to the person insulted the gravest sins (*mahāpātaka*) or treasonable acts (*rājadveṣakārī*). In the second category of insult is put references of an indecent nature to the abused man's sister or wife, and in the third included reference to his alleged addiction to drink or committing sins that would make him an outcaste. Ironical speech that suggests its opposite is a punishable insult (p. 473), as also recital of faults that are not present in the insulted person. Referring to a man's natural deformities ironically in a tone of ridicule is an insult and, though true, punishable with a small fine (p. 475). A man may be insulted by obscene references to his mother, sister or other female relations (p. 479), and an insult of the kind deserves the highest amercement. It is an insult to refer to a person who has been convicted of an offence, by mentioning it as abuse, or taxing him with an act for which he has made religious expiation (*kṛtāpāvanam*) since punishment and expiation purify a person (p. 481). Abuse of the king is the highest abuse and must be punished by the cutting off of the tongue of the abuser (p. 483), for the king and the Brāhmaṇa are the two who sustain the world (*bibhrato jagat*). To call an outcaste an outcaste, and a convicted thief a thief, as an insult, is still an offence, and severely punishable. This is because punishment by expulsion from caste and for theft has purified them (p. 484).

The punishments prescribed for insults or defamation are of varying grades of severity. They range from insertion of a red hot iron into the mouth of the libeller, to beating him and imposing on him graded fines, which might go up in very serious cases to a thousand. In the earlier *smṛtis* (like Gautama and Śaṅkhalikhita) the punishments are harsher than in Kauṭilya or the standard verse *smṛtis*.

A special feature of the law of abuse is that heavier punishments in fines are imposed when the insulted person is of a higher *varṇa* than the insulter, the fine rising with the difference between them in *varṇa*—The standard fine is that which is for insults of one of the same *varṇa*. Dr. P. V. Kane cites *Smṛti-candrikā* (II, p. 327) which states that this discrimination had gone out of use in its days. But the elaboration by Lakṣmīdhara indicates their vogue in his day.

### *Danḍapāruṣya* ( Assault ).

Under this head are brought not only actual assault, like striking a man, but threatening to assault him or touching him. By *atideśa* (extension) certain other matters that are not strictly assaults are brought under this category. Among them are inferiors in social status taking positions that belong to others who have a higher social status. The relations between parents and children as regards parental discipline or between teacher and pupil (*guru-śiṣya*), which may lead to chastisement of pupils, are also brought within this category. Injuries suffered from kept animals or beasts of burden or carriage animals, are also included in this section. Lastly, injuries to trees and plants are also brought in.

As in the case of *vākpāruṣya* the fines are of three grades and the different offences are classed under them. Offences committed by equals get the standard penalty. An offence committed by one of a higher *varṇa* or status gets a lighter penalty than one in the inverse order, the penalty *rising* with the difference in *varṇa* or falling with it. Offences are also classed as those which cause ordinary hurt, and those that cause grievous injuries, such as peeling of the skin, cutting into the flesh, drawing blood, fracture, loss of eyes or ears or nose, or limbs, and so forth. The gravity of the injury decides the penalty's severity.

Means of assault are described as by throwing ashes on a man, or sand or mud, or dust or stones, or striking him with sticks, the hands, or weapons. The indignity involved goes to measure the gravity of the crime for estimating the penalty to be imposed. Kicking is, thus, a more serious form of attack than hitting with hands. In cases of grievous hurt the punishment will depend on an investigation of the nature and seriousness of the hurt caused. In cases of serious injury the assailant is not only fined and punished otherwise also, but he is made to bear the cost of the medical treatment of the injured person. When several persons attack a man *every one* of them is liable to a multiple of the penalty imposable on a similar attack and injury committed by a single person.

Tying up a person with a cloth is an assault of this category.

A threat of assault is also punishable, though not as severely as physical assault. In cases of mutual assault, the person who is found to have begun the assault must be punished more severely.

In deciding the penalty the motive of the assault must always be considered ( Manu, VIII, 286, p. 489 ).

Assault on the person of a King, even if he be a tyrant, will be punished by the offender being burnt alive, tied to a stake ( p. 490 ).

As in modern law, self-defence should not exceed reasonable limits ( Cf. *Indian Penal Code*, sec. 100-101 ). Even a man who has been assaulted and repels it by using a deadly weapon is liable to punishment according to the effect of his reprisal ( p. 497 ). A famous verse affirms that a determined slayer ( *ātātāyin* ) who attacks a man can be killed in self-defence, even if he be a learned Brāhmaṇa, a master of the Vedas ( *vedapārāgaḥ* ).

The right of private defence against attack is admitted by smṛtis even to the extent of killing the assailant, if otherwise the defender would have been killed, but an exception is made in the case of a Brāhmaṇa assailant, with murderous intent. The *śloka* in question about the master of the Veda, who in spite of being a Brāhmaṇa can be killed in self-defence, when construed with the prohibition of killing such a person in Kaliyuga ( *kalivarjya* ) is treated as merely stressing the general rule of self-defence, and as not to be taken literally. The matter has been discussed in *nibandhas*, and has been dealt with at length in my paper on “ *Ātātāyivādha*, or the Right of Private Defence in Dharma-sāstra ” ( Dr. C. Kunhan Raja Presentation Volume, pp. 197 ff. )

#### *Discipline and Assault*

Chastisement is permissible as discipline but it must not be excessive. Manu ( VIII, 299-300, p. 494 ) and Yama ( *ib.* ) lay down that when a wife, a younger brother, or a son or a slave have committed faults they may be chastised by being beaten by the head of the family using a light bamboo or a rope. The fifth is a case of a teacher chastising his pupil. If the punisher goes beyond limits, he is guilty “ like a thief ”. Nārada will make the king punish the teacher ( *guru* ) who breaks this rule. Āpastamba allows an offending pupil to be punished by starvation ( as he lives with his teacher ), baths in cold water and even expulsion from the teacher’s residence ( p. 495 ).

#### *Investigation of Assaults*

If no witnesses are present when a person is assaulted, as when it takes place within a house or in lonely places, the guilt cannot be determined only by the marks of injury, as such marks might be selfmade or faked. In the absence of witnesses or good circumstantial evidence, recourse must be to ordeals ( Brhaspati, p. 495 ).

Even in defence against attack one must not exceed reasonable limits ( cf. *Indian Penal Code*, sec. 100 and 101 ). A similar principle is behind the dictum of Kātyāyana ( p. 497 ) that the man who strikes an assailant with a deadly weapon ( and injures or kills him ) is punishable by the king.

A person insulted by a low-born man or those following low trades ( killing animals etc. ), who whips the insulter is immune from punishment, as the offender is ordinarily liable to whipping ( p. 498 ).

### *Cruelty to Animals*

He who treats animals cruelly, beats or starves them or uses them when they are physically weak or diseased or 'in heat', or starved, is liable to pay the first amercement ( p. 500 ).

Road accidents that happen through breakage of wheels or yokes of carts or of the nose-strings of animals, do not make owner and driver responsible for them ( p. 501 ). But if the injury is due to the driver's ineptitude the owner of the cart is liable. If the cart kills a man, the driver will be punishable 'like a thief' ( Manu, p. 502 ).

Hurting small animals and quadrupeds entails fines.

### *Protection of Trees*

Cutting off the branches and trunks or roots of food-yielding trees makes the offender liable to a fine, and in the case of " sacred " trees ( *e. g.* in a temple ) the penalty is doubled. For cutting off medicinal plants, and clumps in sacred places, the penalty is half that for cutting down trees. The man who fells a fruit tree must pay the highest amercement, and compensate the owner. This is in accord with Vasiṣṭha's adjuration : " Let him not injure trees that bear flowers or fruit, except for sacrifices and extending cultivation " ( p. 504 ).

### *Theft ( Steya )*

Robbery is effected with violence in the presence of the owner of the things taken, and theft behind his back and/or without his knowledge. The former kind is *sāhasa*. Force and fraud are the respective marks of the two.

Theft is divided into three classes according to the value of the articles stolen. To the first belongs stealing earthenware, seats, couches, wood, bones, leather, grass, grain and cooked food; to the second belong ordinary clothing, cattle ( excluding kine ) non-precious metals, rice and barley; and to the last belong precious metals like gold, precious stones, silk, women, kine, elephants, horses and what belong to a temple divinity, or to a Brāhmaṇa or to the king. Secret appropriation of the properties of persons asleep, or of disordered mind or lying drunk is *theft* ( Nārada. p. 506 ).

### *Classes of Thieves*

Already in dealing with the law of evidence the distinction between " open " and " secret " thieves has been dealt with. The terms ' open ' and ' secret ' are somewhat misleading. The essence of the offence is the removal of property. Different types of cheating are classed as " open " ( *prakāśa* ) theft, while we might feel that they are really done stealthily. The difference seems to lie in the time of the operation. Burglars, robbers in forests ( whose identity cannot be made out ), housebreakers, cut-purses, stealers of cattle ( cows, horses

etc.) and stealers of women are classed as "secret" thieves—Most of such thefts have to be done at night. Clandestine acts that are classed as "open" (*prakāśa*) thefts are committed by day in ordinary transactions. In reality they are not so open. Use of false weights and measures or scales that do not weigh correctly owing to the location of the pivot of the balance away from the centre, those who cheat in counting, those who adulterate goods by mingling inferior kinds with superior, or who add sand to grain, or sell articles that are not what they profess to be, though similar in shape or colour, are brought under *prakāśa* *laskarāḥ* ('open' thieves.) Many kinds of cheating or deception are also brought under this class by the principle of *atideśa* (resemblance). Manu (IX, 225-226) classes as secret thieves, *j.e.* thieves proper, gamblers, dancers, heretics, men addicted to evil acts and dealers in wine. The element in 'open' theft as in bribe-takers or mediators of bribes to judges, or corrupt arbitrators (*madhyasthah*), sellers of imitations as genuine articles, false witnesses, practitioners of sorcery or witchcraft, quacks and medicine sellers who adulterate medicines or sell false medicines (like many modern "patent medicines")—is dishonesty, that is analogous to that of a thief, since in both cases the loss falls on parties who are victims, and are made to lose articles or their value in money. In deciding on penalties for the two kinds of thefts, judges must have had to rely on the illustrations given of the two types in *smṛtis* and commentaries. The common feature of all the offences is dishonesty that is designed to deprive people of their effects or money. There are obvious thieves and virtual thieves. Ragguery is described as theft. The cut-purse and the burglar are provided with implements or tools to carry on their work, and the other sort are not. A thief or burglar, may be caught, after search, and found with such tools as well as stolen property (p. 510). Cheating is in effect theft, and treated as such. Cheating in prices leads to the transfer of wealth from the buyer to the fraudulent trader and is treated as theft (p. 517). The users of false or loaded dice in gambling are like thieves and are classed as such for punishment (p. 521). The goldsmith is described by Manu (IX, 292, p. 522) as the worst of cheats *sarva-kantaka-pāpiṣṭha*).

#### *Royal responsibility for prevention of theft*

The king should make good the loss sustained by a person whose property has been stolen. He should institute searches for the lost articles, and if, after he has compensated the owner, he recovers the stolen goods, he may retain them. If a thief is caught by royal officers, but the stolen goods are not recovered, the king must still make good the loss to the owner. The recovered articles may be restored to the owner. The thief who is caught may be made to pay the value of the article stolen to its owner (p. 553). Those who find lost property must intimate the matter to the king, who will give publicity to the recovery through

the public crier. If the owner does not claim it within a year, the finder will get a fourth of its value, and the article will be retained by the king (p. 554). Manu would give the king one-sixth (or one-twelfth) of recovered lost property (p. 555).

#### *Search for Thieves (Corānveṣaṇam).*

The responsibility thus laid on the king makes it more than commonly necessary for the state to start investigations that will lead to the discovery of the thieves and recovery of lost articles. Thieves may be traced by skilled persons, through footprints, or in the case of cattle-theft by the marks of the hoofs of the animals, by skilled persons. Caṇḍāla executioners and those who are accustomed to roam at night must be used to discover the criminal (p. 545). If the footprints of the thief stop at the border of a village and cannot be traced beyond it, that village must be held responsible to make good the loss. Villages in which criminals have been formerly found must be made to clear themselves. Places where thieves or criminals usually gather, like water-booths, drink-shops or taverns, brothels, theatres, assembly rooms, old gardens, uninhabited houses and groves must be watched by the police or guarded by them, and they must also patrol. These are for the prevention of thefts (p. 545). Expert criminal hunters must be used to discover them from associates, and by contact with them (p. 546). But those who are not thieves may be found with thieves. This necessitates caution (p. 547). Old criminals may be subjected to questioning. If a person who is not the thief is made to give its value, and later on the mistake is discovered, the thief catcher must be made to reimburse the harrassed person (p. 547).

#### *Harbouring thieves*

Harbouring thieves is an offence. Villages which afford food and lodging to thieves, and places of hiding should be punished. Those who provide thieves with arms, implements, fire, food and asylum or who connive at their escape, must be punished like thieves (p. 548). One who lets a thief escape when able to catch him must be punished as a thief (p. 548). Receivers of stolen property must be punished like thieves (p. 549). A brāhmaṇa, who accepts a gift from a thief, should be dealt with like a thief (p. 550).

Responsibility to help the state in preventing thefts and in catching thieves is thus laid on all subjects, and particularly on the police and servants of the state generally. If they remain passive during raids by dacoits and do not hasten to help the attacked villagers and the destruction of their crops (*hila-bhaṅga*) or highway robbery, they will be exiled after their properties are confiscated to the state.

### *Culpability according to Varna*

A long widespread modern view has been that in ancient India persons of higher castes either escaped punishment or were let off lightly for offences for which the lower castes were punished severely. This is contrary to the Smṛtis. Criminal responsibility was rightly held to rest on knowledge and discriminating power. The higher *varṇas* were regarded as possessing this capacity in a higher measure than the lower. This will account for the rules laid down by Manu (VIII, 337-338) that the culpability of a Śūdra is eightfold, of a Vaiśya sixteenfold, of a Kṣatriya thirtytwo-fold and of a Brāhmaṇa sixty-fourfold or a hundredfold or even twice sixtyfour-fold. This is the gradation of the penalty to be imposed on offenders conscious of their crime, *mens rea*.

### *Punishment of Thieves*

For housebreaking at night the punishments are impalement and lopping off the hands (Manu, IX, 276), after the stolen property is restored to the owner (Vyāsa, p. 527). Hanging is the punishment for highway robbery (p. 528), and the highwayman's property is confiscated to the State. Death is the penalty for stealing women (Manu, p. 528) and, according to Vyāsa, the kidnapper must be burnt to death over a slow fire after his limbs have been lopped off (p. 528). An additional punishment is the confiscation of the property of the criminal (p. 529). It is also the punishment for the theft of a boy, a horse, or an elephant (p. 529).

Curiously the "theft" of a royal prince is not so heinous as it entails only corporal punishment or a fine of eight thousand (*Jha*, I., p. 449), and half of it for kidnapping (stealing) any other member of the royal family. Yājñavalkya will subject all kidnappers to impalement (II, 273, p. 530). Death is the penalty for those who break into a royal storehouse or armoury or the sanctum of a temple (p. 530). Mutilation (graded) is the punishment for theft of cattle. The pickpocket and shoplifter should have their thumb and forefinger cut off (p. 531), and on repetition of the offence they must lose a hand and a foot (Yājñavalkya, II, 274). Grain theft is punished by a fine of ten times the value of the stolen grain, and also a fine to the king of twice its value (*Bṛhaspati*, p. 532).

Manu makes the penalty for this offence eleven times the value of the grain, and as much as a fine. Crops destroyed (maliciously) by husbandmen is theft, and entails a fine of ten times the king's share (p. 532). Death penalty or mutilation of limbs is imposed on theft of costly gold articles or bales of costly clothing, or precious stones (p. 533-534). For theft of farm implements the fine is 108, when done during cultivation (p. 534) and for stealing flowers and unhusked grain the fine is only 5 kṛṣṇālas.

The Smṛtis supply standard specifications of the loss or accrueement in different cases like weaving, metal work etc. For stealing articles of small value there are small fines *e. g.* for milk and milk products the thief should repay the value to the owner and twice the value as a fine ( p. 537 ).

*Penalties for persons committing Manifest Theft ( prakāśa taskara )*

If a trader abstracts an eighth part of an article sold by the use of false measures or scales, he will be fined in proportion to the degree of cheating, that for stealing an eighth part being 200 paṇas ( p. 512 ). He who sells as seed what is not seed must suffer mutilation ( p. 513 ). Adulteration of medicines, salts, molasses and the like, with inferior stuff, entails a fine of 12 paṇas. Mutilation is the penalty for using false weights and measures ( p. 515 ), or the highest amercement. Curiously, counterfeiting coins is to be met only by the highest amercement, as coins were only ingots of metal, whose weight was known ( p. 515 ). Combinations of traders to enhance prices is punishable by a fine of 1000 paṇas ( p. 516 ). The exportation by traders of articles in which the state has a monopoly is met by confiscation of entire property of the culprits ( p. 515 ). The sale of prohibited articles is met by corporal punishment and mutilation ( p. 516 ). A quack is punished as a thief ( p. 520 ). He who plays with false dice is to be expelled from the gaming house ( p. 520 ). Stakes must be open. A gambler who cheats will be banished ( p. 520 ). Corrupt judges must be banished ( p. 521 ). The sellers of false gold etc. must pay back the price given thereof, and double the value as a fine to the king ( p. 523 ). The wastage in metals ( gold, silver, copper, zinc, lead etc. ) is stated in percentages, as also of silk, cotton or woollen cloths. A deficiency beyond the limits indicated entails fines ( pp. 524-526 ). A washerman who wears the clothing given for wash is fined 8 paṇas ( p. 526 ). Loss of a cloth given for wash must be made good by the washerman ( p. 526 ).

*Crimes of Violence ( Sāhasa )*

Of the five types of *sāhasa* enumerated by Nārada manslaughter ( *manuṣya-māraṇam* ), robbery and indecent assault on a woman are three ( p. 557 ). The two kinds of *pāruṣya* and theft are the two others that have already been dealt with.

It is usual to classify offences into kinds varying with the severity of the penalties imposed. The three kinds usually reflect the lowest, middling and highest punishment. Violence of the first sort is illustrated by destruction of trees, fruit, roots and water reservoirs etc.; injuring cattle, or clothing, food, household utensils or drinks represent the middle class; taking away a man's life, by weapons or poison, and attacks on life generally and violence to another man's wife constitute the highest type of violence ( p. 557 ). For the first type



of offences fines range from a hundred, according to the damage done ; for the second type fines beginning with two-hundred and above are fixed ; and for the third class represented by the robbery of costly things (*uttamadravya*) like gold, precious stones, the property of gods and Brāhmaṇas and hurting men and women still higher fines and corporal penalties are indicated ( p. 557 ). The penalty imposed must suit the crime. For the middle type it must be between 100 and 500, and for the highest bodily penalties ( amputation of limbs and branding ), confiscation of entire property and banishment, are prescribed. For ordinary property robbed the penalty is a fine of twice the value of the article robbed, and four times the value, if the offence is denied by the accused ( Yājñavalkya, II, 232 ). The second amercement is for demolition of walls or houses. For breaking idols or causing damage to temples, the penalty is the first amercement ( p. 566 ). This is also for obstruction of channels or making breaches in ramparts ( p. 537 ). For setting fire to a house or a forest or threshing grounds the penalty is beyond the fine limit, and may extend to death by fire ( Yājñavalkya, II, 278 ). For making a free girl a slave, death is the punishment ( p. 566 ). Breakers of irrigation dams must suffer mutilation or death. Though ordinarily the punishments for women are lower than those for men, a woman who has set fire to a house, or poisoned a person, or killed her children, husband or elders should be tied up and thrown into water, *unless she is pregnant*. Killing a woman who is pregnant is killing her and the unborn child. Yama would subject persons guilty of arson, grave theft and murder and abetment of murder only to corporal punishment ( p. 567 ). Procuring abortion and causing hurt by weapons earn only the highest amercement ( p. 571 ). Uśanas discriminates between modes of causing abortion and would sentence to the highest amercement only the one who uses the most violent ( p. 571 ).

For murder, death ( in various forms ) is the penalty, according to the gruesome nature of the offence, and the murderer's property is to be confiscated also ( p. 571 ). An offence or crime has to be expiated by penances of various kinds (*prāyaścitta*), and the *dharmaśāstras* describe these. Here too the penance is more severe to one who murders a Brāhmaṇa or an *ātreya* ( a woman, after her menstrual bath, who is fit to conceive ) than for the killing of persons of lower *varṇa*. Heavy fines on poor *varṇas* might be less welcome to the culprits than even death. When several men attack a person and kill him, he who gave the fatal blow is alone to be sentenced for murder ( p. 572 ). The other assailants of the murdered man shall suffer only half the penalty of the person who struck the fatal blow ( p. 573 ) and their culpability and its penalty should be determined by consideration of the kind of injury their attack caused short of death ( p. 573 ). The inciter or the man who engages another to do a crime for him, must pay four times the fine impossible on the actual culprit ( Yājñavalkya, p. 573 ).

Considerations of *varṇa* enter into the determination of turpitude and penalty. If one of a lower *varṇa* murders a Brāhmaṇa the penalty is death along with confiscation of the entire property of the criminal (Baudhāyana, p. 572). Śaṅkhalikhita (p. 566) impose the penalties of mutilation or death on one who sells as a slave a girl who is not a slave. Kātyāyana brackets as equals in turpitude he who commences a violent attack (*sāhasa*), or gives advice to another as to how the violent crime is to be done, or gives asylum to a criminal guilty of such an offence, or arms him, or feeds him, and who does not prevent the commission of the offence though in a position to do so, with the actual criminal; both must be punished alike (p. 574). Admission of a crime may lead to the imposition of only half the normal penalty for it (p. 574).

#### *Extension of the Idea of Sāhasa*

A number of offences, some of which will now seem trivial, are brought under this category. Some have their basis in a feeling of resentment against an act done contrary to accepted *varṇa* rules. Thus entertaining a *śūdra* ascetic as a guest in an oblation to gods entails a fine of 100 paṇas (Viṣṇu, 559). An untouchable (*asprśya*) who touches a *dviija* deliberately (*kāmakāreṇa*) is fit for death (*vadhyaḥ*, p. 560). He who abuses a venerable person is to be fined. Relations like husband and wife, brothers and sisters, father and son as well as preceptor and pupil who abandon each other without proper cause shall be fined 100 paṇas. Parents, wives or sons cannot be abandoned unless guilty of offences involving loss of caste; if one transgresses the rule the penalty is a fine and is 600 paṇas (p. 561). Omitting to invite a Brāhmaṇa neighbour to a feast or a śrāddha dinner is an offence. He who does not come to eat, after accepting an invitation to dinner, is liable to fine. A Brāhmaṇa who accepts an invitation to accept a gift, and fails to go to accept it, without proper cause, is to be fined 10 paṇas. Witnesses in a dispute between father and son are liable to fine (p. 563). Offering food that he should not eat to a Brāhmaṇa is an insult and is punishable by a fine of 100 *suvarṇas*. The man who compels another to eat or drink what he is not allowed to eat or drink will be fined (p. 564). The seller of used shrouds is to be fined. A man, who, in trying to conceal the visit of his wife's paramour, calls him a thief (*jāram coram ili abhivadan*) either from shame or from getting a bribe from the culprit must pay a fine of 500 (p. 534). Performers of magic rites aimed at damaging others (*abhicāra*) are to be fined 200. A *śūdra* who masquerades as a Brāhmaṇa is to be fined 800 (p. 535).

Dishonest officials may be put to death by the king (p. 568) and bribe takers deprived of their property. Disrespect to the king of various kinds are punishable severely (p. 569). He who tries to usurp the throne should be killed (p. 569). Forgers of royal edicts, policemen who allow criminals to escape, sowers of dissension and persons helping the king's enemies must be put to death (p. 570).

A Brāhmaṇa is immune from both death and corporal punishment. He will have his head shaved (*i.e.* the tuft, which has religious value, removed), branded on the forehead with marks of infamy and banished from society, or imprisoned and made to do ignoble kinds of work (p. 573). The former punishment, by depriving the criminal Brāhmaṇa of means of expiation or purification (as he has become an outlaw), virtually sentences him to death by starvation outside society, with the dread of postmortuary punishment for the unexpiated crime. For one who has been brought up in faith in transmigration, death has not the terror that it may have to an atheist or materialist. The punishment thus meted out may be described as worse than capital punishment, which, if undergone, expiates the crime.

#### *Detection of Grave Crimes*

When a person is found killed and the perpetrator of the crime is not found, his sons, relations and neighbours should be interrogated regarding his morals, quarrels and so forth, to find out possible causes. The king's officers must try all possible means of discovering the culprit. The person arrested as perpetrator of the crime must be subjected to an ordeal, when there is no clear proof of his guilt. If he is cleared by the ordeal, he should be set free, but suffer the death penalty if the ordeal goes against him. Crimes of violence may be met by impalement or other terrifying punishments. The aim is less to frighten the culprit as to terrify others (p. 575). Bṛhaspati affirms rightly that it is by kindness to good men and by punishment of criminals that the fame of a king grows (p. 576).

#### *Abduction of Women (Strisamgrahaṇam)*

Such abduction is for adultery. It is viewed as a very grave offence as it involves not only a moral fall of the parties but may lead to a mixture of blood between *varṇas* in a normal (*anuloma*) or abnormal (*pratiloma*) order. A king's fame is enhanced by prevention of such acts (p. 680).

The women with whom adultery may be committed may be of different classes, who are classed as "protected" (*gupta*) and "unprotected" (*agupta*), virgins and non-virgins, prostitutes and kept-mistresses, women who make a living by prostitution, and women of castes that subsist by the immorality of their women *e.g.* minstrels and actors (p. 590). Unnatural sex relation is possible between men and men, and women and women, as well as unnatural ways of sex-union, and is punishable.

#### *Kinds of Adultery*

Adultery, says Bṛhaspati, has its root in sin (*pāpamūlam*), and it is of three sorts, *viz.*, brought about by force, deception or sensual desire (p. 577). The first is rape, and is committed on an unwilling woman who cries for help,

or on one who lies asleep, or drunk or unconscious; the second, when a woman is led to a man's house by false pretexts and made to have intercourse with him; or after a good deal of flirtation, the details of which are described, the woman yields to her sensual desire, which has been stimulated. Meeting a woman in a solitary place and casting amorous glances at her are deemed by Vyāsa as adultery of the first sort; so also doing those things that are now referred to as "dating" constitute adultery though it is only flirtation, not ending in sex intercourse. The next step is sending a woman garlands, perfumery, ornaments and clothes as gifts, which she accepts. This may lead to greater familiarity and end in adultery; it is of the second degree. Sitting on the same bed, embracing, dallying and touching one another in forbidden places on the body constitute the highest degree of adultery as it must end in sex intercourse. A man who has come to this stage may, if discovered, be arrested for adultery, even though the intercourse has not taken place [p. 571].

Kātyāyana classifies adultery by signs of intimacy like these (p. 580). For the three grades of adultery, which does not end in intercourse, fines are prescribed, and the amount of the fines is not absolute, as it may be enhanced when the male is wealthy (p. 581). A man who has been convicted of the offence once before will be convicted again even if he is found conversing with a woman. A go-between or pimp should be punished like an adulterer (p. 581). It is not adultery if a woman of her own accord comes to a man (p. 582), and if wives of men suffering from pthisis, or impotence or who neglect them for other women come to a man of their own accord, he is not criminal (p. 582). Professional workers can speak freely with women, protected or not, without being suspected (p. 582). When one is forbidden to speak to a woman, and does so, he is guilty and must be fined one gold coin (p. 582). Manu denounces adultery as likely to lead to confusion of castes, and exhorts kings to stop it by stringent penalties. A non-Brāhmaṇa, rules Manu (VIII, 359), who commits adultery with a Brāhmaṇa woman can be sentenced to a penalty upto death (*prāṇāntam*). As pointed out on p. 584, *infra*, this interdiction of Manu applies, according to Medhātithi, to *all* cases of adultery, whether *anuloma* or *pratiloma*, i. e. with a woman of equal or lower varṇa or the reverse, because "for social security, wives *must* be protected from taint, even more than life and property, irrespective of caste." But, Lakṣmīdhara, followed by Caṇḍeśwara and Vācaspati-miśra, restricts the rule to *pratiloma* adultery. Medhātithi holds that only a Śūdra should suffer death for adultery with a Brāhmaṇa woman.

#### *Penalties for Co-habitation (Abhigama-daṇḍāḥ)*

For rape the punishment is death, and it may be coupled with confiscation of the entire property and the cutting of the organs of the culprit before he is put to death (p. 585). For incest (in both a restricted and in an extended

sense so as to include adultery with a teacher's daughter) the same punishments are laid down by Nārada, who rules that adultery with a queen is equal to incest (p. 587).

Intercourse with her consent, with a 'protected' woman (*guptā*) shall be met by a fine of 500: if it has been without her consent, but not (like rape) by force, the fine shall be 1000. A Brāhmaṇa culprit will have his head shaved. The same penalty is for similar offences by men of other varṇas. The twice-born man who commits adultery with a Sūdra female shall be "banished", according to Āpastamba. Repetition of the offence by a culprit leads to double the prescribed fine for a first offence. Intercourse with *caṇḍāla* women is banned by very severe punishments, upto death (p. 589). The pollution of Brāhmaṇa lineage by adultery by men of lower varṇas with Brāhmaṇa women is prevented by very severe penalties to both the man and the woman, who is asked to be devoured by dogs (p. 591). Vasiṣṭha in dealing with the sin caused by adultery notes that submitting to the legal punishment purifies the offender of the sin: it acts as expiation, a common doctrine of smṛtis. A woman who seduces a man, by coming to his house and tempting him, shall be disfigured and thrown into water (p. 593). A raped woman is to be kept guarded with bare clothes and food (p. 594) for her expiation; but no criminality attaches to her.

#### *Pollution of Virgins (Kanyāduṣaṇam)*

The defilement of a virgin is a heinous crime as it will take away her chances of marriage. In view of the low age for marriage prescribed in smṛtis, it will mean also physical injury to girls who may not have attained puberty. The death penalty, laid by Manu (p. 595) for the defloration of an unwilling virgin girl, is intelligible in view of what she is made to suffer. If the violator is of the same *varṇa* as the girl, he must be made to marry her without dowry (Medhātithi, p. 595), and he may have to pay the *śulka* (bride price) to the father, as in *āsura* marriage. Medhātithi remarks that marriage is not invariably based on affection (*necchāsamyogamātram vivāh*), and the violator must marry the girl though they may not like one another (p. 596). For a *pratiloma* seduction the penalty is death, according to Yājñavalkya (II, 288). If the violation has been through the girl's willingness the man shall be only fined (p. 597).

#### *Unnatural Offences*

A woman violating a girl shall be fined, and have to pay her nuptial fee; and with her head shaved (p. 597) she should be paraded on an ass's back.

#### *Intercourse with Harlots (Bandhakyabhigamanam)*

Intercourse with a harlot of his own caste entails only a small fine, which will be enhanced if she is of a lower *varṇa*. Intercourse with another man's kept

mistress will be treated and punished as adultery with a married woman. It will entail a fine, however, of only 50 paṇas. If several men have intercourse with an unwilling prostitute, each shall pay a heavy fine. Intercourse, against the order of nature, with a woman by a man, is punishable as is intercourse with a female animal (p. 599).

#### *Husband and Wife-Their Mutual Relations (Strīpūmyoga)*

In the previous section Lakṣmīdhara had dealt with a vicious life brought about by sex impulse. In the present he deals with the duties of women, married or unmarried, virgin or widow, with children or childless. Caṇḍeśwara points out (( *Vivādaratnākara*, p. 409) that it is the duty of the king to see that husband and wife live righteously, following the duties indicated by true Dharma (*nijadharma*) and they should be punished if they violate the duties prescribed by śāstras, the king taking action *suo moto*, as law-suits between husband and wife are prohibited. For the guidance of the king and courts, as much as for married couples, a full treatment of the mutual duties of a married pair is necessary. Lakṣmīdhara has kept this in view, and dealt with the subject elaborately, after having already dealt with the rites of marriage (*vivāhavidhi*) in his *Gṛahasthakāṇḍa* (pp. 70-101). No topic is of more importance at any time than the determination of the reciprocal *duties* of men and women, and especially of those who are united in wedlock. It may be noted that adultery and sex-offences are deemed more heinous in Dharmaśāstra than in modern law, and that the attitude reflects the ideals of the day, which have now greatly changed, especially in the West. Marriage is the most important sacrament for women, and it is equally important for men, in order to enable them to discharge their duties to ancestors, gods and society. It will run smoothly only when its duties are clearly understood. Performance of enjoined religious duties, procreation of sons and consequent provision of rites to ancestors, and pleasure (*rati*) are possible only from marriage.

#### *Duties of the married pair*

The duties are eternal. They are not destroyed by the death of one of the partners, or even of both. The husband's happiness and welfare depend on the wife. Women are the Goddess of Prosperity (Śrī), conferring good on those whose prosperity they desire, petted or controlled (p. 610). Viṣṇusmṛti (inf. p. 621) puts into the mouth of the goddess Lakṣmī (Śrī) the declaration that She dwells in women who are chaste, of pleasant speech, of personal and spiritual purity, delighting in making themselves pretty by wearing jewellery, of frugal habits, who are mothers of children, and are of tidy habits, who are self-controlled, unquarrelsome, charitable and generous by nature, and never deviate from Dharma. The implication is that worldly prosperity comes to such wives. *Pai-*

ṭhinasi (p. 627) calls wives the goddesses of the home (*gṛhadevatāḥ*). Women are the goddesses of prosperity of the home (Manu, p. 609).

Happiness of the home rests on the happiness of its women. The gods are generous only where women are honoured (p. 610); where they are not honoured no sacred rite yields rewards that are promised for their performance. Where dependent women are in sorrow, the family perishes, as if by spells. Women must be honoured, loved and treated with kindness and affection (p. 610) by all the men of the family. The wife is to the husband a gift of the gods (*devadattā*), not wed of his own free will (p. 611). Women were created to be mothers, and men to procreate sons; so, religious rites must be done by them together (Manu, IX, 96). The root of domestic bliss is the wife (Dakṣa, p. 614).

#### *Dependence of Women*

Women should not be made independent (*asvatantrāḥ kāryāḥ*) but must be kept protected by their men, day and night, so as not to get lost in sensual enjoyments (p. 601). The smṛtis take a low view of the effects of leaving women free. Nārada holds that freedom ruins women (p. 602) and Manu endorses the view stating that they are protected in girlhood by fathers, in wedded youth by husbands, and in old age by sons. The view is endorsed by other smṛtis, e.g., Yājñavalkya, I 85. If father, husband and son are not alive, the agnates (*jñātayaḥ*) in the joint-family should protect such women. Hārīta holds that women get ruined by freedom, misbehave with men (other than their husbands) and beget children by intrigues. A ruined wife means a ruined family, and a ruined line (*tantunāśaḥ*). "If the link connecting legitimate descendants is lost, the sacrifices to ancestors and gods are lost, Dharma is lost and the Self is lost" (p. 602). An unprotected woman may be led into sin, and ruin both her parental family and that into which she has married. He who guards his wife well, guards his line and his Duty (p. 603). Mixture of blood may occur if a man of higher *varṇa* marries a woman of lower *varṇa*, but confusion of *varṇa* (*samkara*) is generated by adulterous women. Pāṭhinasi admonishes husbands to guard their young wives, so that temptation may not lead them astray. Married women should be guarded by elderly women of the family. A woman who is widowed should be protected, if she has no husband or parents or sons, by agnatic and cognatic relations. If no such protectors are available, she becomes a ward of the king, who should see that she does not go astray (p. 604).

A girl not married when she is nubile, and a wife who is left alone by her husband, or a mother neglected by her son cause those who neglect them to incur dishonour and sin. Manu and smṛtis hold that women succumb easily to sex impulse and go astray. The condemnation of feminine weaknesses, as if they were common to all women, is only an emphatic way of drawing attention to the

risks that exist for some of them. Manu describes women as *nirindriyāḥ*, and it is interpreted by Medhātithi as 'devoid of organs', *i.e.* strength, and he holds that courage, patience, intelligence and energy are wanting in women, who are so described in this expression (p. 605). Varadarāja taking *indriya* to mean 'soma' (used in Vedic sacrifices) says that it only means that women are disqualified by their sex for doing Vedic rite (*Vyavahāranirṇaya*, p. 455). Lakṣmīdhara interpretes the term as meaning "deficient in strength," *i.e.* wanting in a sense of Dharma, and strong intelligence (p. 606). The condemnation of women is carried further by Dakṣa who compares them to leeches (*jalauka*) because they suck away a man's means in jewellery, clothes, strength (*bala*) and virility (*virya*). Like a neglected ailment that becomes chronic and serious, a wife that is left unguarded and uncontrolled wanders on wrong paths freely (p. 606). Whatever a wife craves for when she is in menses, in that form is her offspring likely to be (p. 607). The Mahābhārata exclaims that as fagots do not satisfy a raging fire so women are not satiated by men (p. 608).

#### *Means of Safeguarding a Woman's morals (Rakṣāvidhiḥ)*

Keeping wives fully employed and engaged in domestic work and in religious duties are ways of keeping them away from vice. A wife must be the mistress of the house, control its expenses see its religious duties performed correctly, busy herself in collecting and safeguarding the husband's wealth and in feeding him (Manu, p. 608). Work is the best protection. A woman becomes like her husband in nature as sweet waters from rivers become saltish when they mingle with the water of the ocean: she raises herself to his level and falls also with it. Between a good wife and the goddess Śrī there is no difference (p. 609). Conjugal happiness and heavenly bliss spring from their virtuous activity. The husband is reborn in the wife. Gods are pleased to dwell where wives are well treated, and leave the houses where they are not. A family perishes if its women are sunk in sorrow. When a man leaves on a tour, he must give his wife money for running the house in his absence.

Among the several wives a man may have, the senior-most is she of his own *varṇa* and she alone can share his religious duties and rites. Kātyāyana would apparently allow one who has a son to do this duty instead of the senior most (p. 612) as he is in favour of wives being made to participate in religious duties by turns, irrespective of seniority (p. 612).

A husband should tolerate a wife's weakness for a year after which she may be set aside. But a wife who shows aversion to an evil or diseased husband cannot be cast off. A husband who abandons his wife must be compelled to give her a third of his property (Yājñavalkya, I, 76) for her maintenance. One who abandons his wife through infatuation or unjustly has no defence. A wife



who practises abortion or is unchaste or recklessly extravagant or attempts to slay her husband may be set aside. The age of supersession for a wife is thus fixed by Baudhāyana : One who has begotten only daughters after twelve years, one who is barren after ten years, and the mother of still-born children after fifteen years—but, at once, the wife who speaks harshly (*apriyavādinīm*). The last is not meant literally and is only a warning against shrewishness in a wife (p. 617). An immoral wife, and especially one who commits 'incest', is to be abandoned, but her imprisonment or slaying is not allowed (Yama, p. 618). An unchaste wife must be maintained on starvation rations.

### *Rules for Good Wives*

Frugality, devotion to house work and the service of the husband and elders of the family, due performance of religious duties, and of vows, with the permission of the husband, modest dress, avoidance of talks with men, avoiding conversation on objectionable topics, not standing at doorways or always looking out of windows, avoidance of drinking liquor and sleep after the husband does so, and waking before him, are some of the virtues indicated in a good wife (p. 622). The *patni* (wife) is so called because she is devoted to her lord (*pati*). 'Wife' is synonymous with 'home' (*grham patnī*, p. 623). A long list of acts to be done by a good wife is given from Hārīta. Most Indian wives have lived up to these ideals (pp. 624-625). Tending the Holy Fire keeps a wife happy and prevents her widowhood (p. 626). A sick husband should be tended, not disliked. A good wife is true even to a vicious husband (p. 627). A wife should not observe fasts, when her husband is alive, as it will shorten his life (p. 628). On rebirth a virtuous wife enjoys all happiness (p. 629). She who shares her partner's joys and sorrows, and dies on his pyre, is the ideal of chastity. A disloyal or harsh wife is reborn as a jackal (p. 630). A brāhmaṇa wife who is addicted to drink will not attain heaven (p. 631).

The wife whose husband has gone abroad (*proṣitabhartṛ*) is under certain inhibitions. If he has gone on a long journey without providing for her expenses, she should subsist by doing blameless manual work (Manu. IX, 75). She should avoid visits to public places, not adorn herself in fine clothes and jewellery, nor take to visiting or dancing or drinking spirits. Vyāsa recommends the faithful wife to commit *sati* if her husband dies abroad; her self-immolation will earn him beatitude. A chaste wife, declares Bṛhaspati (p. 634), who commits *sati* is not guilty of the sin of suicide. She should receive funeral offerings like one who has died naturally. But pregnant wives and wives with young children, who are widowed, are not to commit *sati*. Whether she dies on his pyre or survives him, the wife lives only for his good (p. 635). Lakṣmīdhara accepts the authority of *Brahmaṇyāna* (which he has cited) for holding that the Rgveda VII, 6, 27

sanctions *sahamarāṇa* or *sati*.

The widow who survives should strictly follow vows and fasts, be celibate, practise charity, live on spare food and emaciate her body. No remarriage is permitted, says Manu (V, 162).

Medhātithi holds (p. 667) that *sati* is forbidden as it is suicide (*ātma-tyāga*), Yama forbids levirate (*niyoga*) for raising progeny and holds that childless women have attained heaven in lakhs. Let her therefore live a chaste and ascetic life. This view is endorsed by Kātyāyana (p. 668).

### *Levirate (Niyoga)*

Lakṣmīdhara cites Manu, IX, 59 (p. 639) which states that on failure of offspring, a woman, permitted properly may have intercourse with her brother-in-law or a *sapinda* of her husband for raising offspring. But Medhātithi points out that an elder brother, who approaches the wife of a younger brother, and a younger brother who has intercourse with her, except in times of misfortune, become outcastes, though authorised to act so. Failure of issue does not necessarily mean only of sons, as pointed out by Madhātithi. A daughter may be made to take the place of a son, and treated as such with the designation of *putrikā*. If therefore a daughter exists, though sons do not, *niyoga* is unnecessary and unpermissible. The approval of *niyoga* must be taken from the husband's father, brother etc., and not the woman's father. The intercourse must take place only when the full ritual (e.g. anointing the body with butter etc.) is done. *Niyoga* is thus to be treated as permitted but not enjoined. Nārada will have the relation continue till the woman conceives (p. 640), as it is not due to amorousness. The son born in *niyoga* is termed *kṣetraja* (Yājñavalkya, I, 69). Devala will allow *niyoga* when the husband has become an outcaste or a traitor to the king or has disappeared, but this is contrary to Nārada's injunction to wait for eight years for the reappearance of a husband, who has vanished (p. 641). Verses of Manu (IX, 64-67) condemning *niyoga* are cited by Lakṣmīdhara. Under the *mīmāṃsā* rule on the validity of statements, the *later* rule must be held to supersede the earlier, and Manu must be deemed to reject *niyoga*. Bṛhaspati regards *niyoga* as forbidden for the present age. "Many kinds of sons were recognised by ancient sages, which cannot now be accepted as men of our age are destitute of the powers that enabled those of former ages to practice them with impunity" (p. 644).

### *Women who have been used before (parapūrvāḥ).*

Nārada mentions seven kinds of wives as enjoyed before by others. Of these, the remarried woman (*punarbhū*) is of three kinds, and the wanton (*svairiṇī*) of four. A virgin widow remarried is the first *punarbhū*; she must go through the marriage rites when married a second time. A girl who after leaving

her husband takes to another man, and later returns to her husband is the second type. When a woman, on failure of brothers-in-law, is delivered to a sapinḍa by her relations, if of the same caste as her, is of the third kind. A woman who goes to live with another man, from love, is the first type of wanton (*svairiṇī*). When a widow rejects *niyoga* and unites herself with a stranger from love, she is the second type of wanton. One who gives herself away to another from hunger is the third kind. A woman who, after being married in proper way, is afterwards married to another improperly, is the last kind of wanton. Manu notes that the *parapūrvā* is despised by the world (p. 645). The children of *punarbhū* woman are despised, as is the *punarbhū* herself. Intercourse with women rescued from robbers, or rivers, or famine or confusion in the country, and taken as mates will not taint the persons who cohabit with them. A woman who does not like to be given away to a man, must not be given away against her will (p. 647).

### DĀYABHĀGA

#### Definition of Dāya

*Dāya* is wealth coming to a person by reason of his relationship. It is placed first among the seven sources of 'property' mentioned by Manu (X, 115). This is the definition of the *Milākṣarā* (II, 114). The *Nighaṇṭu*, cited by *Smṛticandrikā* (II, p. 255), defines *dāya* as 'parental wealth which has to be divided' (*vibhaktavyam pitṛdravyam dāyam*). *Smṛtisāṅgraha*, which is also cited by *Smṛticandrikā*, makes the position clearer by defining *dāya* as wealth which comes through the father or the mother (*pitṛdvārāgatam dravyam mātṛdvārgatam ca yat*). *Vyavāharamayūkha* (ed. Kane, p. 93) defines *dāya* as the wealth which is to be divided, and which is not the wealth of re-united members. (Jīmūta-vāhana explains the words "father's" and "by the sons" as illustrative, and as relating to the wealth of a father, grandfather etc. distributed among his relations, like sons, grandsons etc., by reason of their relationship. Nārada defines *dāya-bhāga* as the division or partition of property of father and others (*pitṛyādeḥ*, inf. p. 648).

#### Time of partition

Manu is cited at the beginning of this subsection by Lakṣmidhara (p. 648) to show that the division of property is to take place after the death of both parents, as while they are alive the brothers (*i. e.* sons) have no power to divide the property. *Pitṛka* in the dictum of Manu is explained by Kulluka as meaning both paternal and maternal property. If the father is an outcaste (*patita*), he will be regarded as dead for the purpose of the division of the property. Devala (p. 647) repeats the dictum of Manu that the sons are devoid of any right to partition so long as the parents are alive, and not 'civilly dead' as an

outcaste or an ascetic will be. *Vivādaratnākara* explains that "parental" (*pañtṛkaṃ*) includes the property of grandfather etc., and that as daughters have the first claim on the mother's property, the right of sons to partition must be regarded as to come only after them or if there are no daughters.

Manu's declaration that the sons are not lords (*anīśāḥ*) of the property when the father is alive (*jīvatoḥ*) and the dictum of Devala that they are not owners, so long as an untainted (*nirdoṣa*) father is alive, are taken by the school of Jīmūtavāhana as denying the contention (which is upheld by the *Mitākṣarā*) that sons, as soon as they are born, acquire a right in the family property. Sons are not masters of *artha* (wealth) and *dharma* (the duties imposed by Dharma, like the offerings to deceased ancestors) (*Śaṅkhalikhita*, p. 649). The father's property may, according to Gautama, be divided by the sons and father, if he so desires it, during his lifetime, but it must be after the mother is past child-bearing (*nivṛtte rajasi mātuh*), as the partition may have to be reopened if the mother gives birth to a son or sons after it has been made. *Dāyanirṇaya* (XVII, 2-6) brings under the term "mother" stepmothers also, and holds that when they are both past child-bearing and the father is willing to allow partition it may be made. Nārada (p. 653) adds two other conditions for partition during the father's life, viz., his having lost sex-desire and sex-power and the sisters having been married. Śaṅkhalikhita (p. 653) states that partition during the father's lifetime may be made with his permission (*anumataḥ*), openly with the help of mediators or secretly, without it.

Hārīta (p. 643) states that if the father becomes a forest-dweller (*vānaprastha*), he may, before doing so, divide his property between his sons, or he may become a sanyāsin after doing so; or he may continue his residence in the family house, retaining a small portion of the property he had himself acquired, and when his means are exhausted he can recover the property from the sons. The disposal of self-acquired property by the father is within his rights (*Viṣṇu*, p. 654). A rule which Nārada cites is that the father in dividing the property between the sons, may retain a double share for himself. The self-acquired gains of the sons during the father's lifetime, (barring 'gains of learning') should also be equally divided between the sons at partition (*Manu*, IX, 215). But Nārada's dictum that the father is lord of all the wealth (*sarvasyeva pitā prabhuḥ* p. 655) is cited by Lakṣmīdhara immediately after the citation from Manu, and must be held to qualify it by its position in citation. Brhaspati also holds the same view as Nārada and adds that the sons who go against the father's scheme of unequal distribution should be brought to order (*vineyāḥ*). A rule of Śaṅkha, cited by the *Mitākṣarā*, but omitted by Lakṣmīdhara, is that the property may be divided even against the wishes of a father, who has become senile, of disordered mind or overcome by disease (*vrddhe, viparītacetasi, rogiṇi*). The

earlier writers are against partition in the father's lifetime ; when he gets old and senile, or diseased or of disordered mind, the undivided property should, in the father's lifetime, be looked after by the eldest son." The family has its roots in property ; sons with fathers living are unfree (to divide the estate)" (p. 651, Śaṅkhalikhita).

The father who recovers a debt or property which could not be recovered before, by his own efforts, need not, unless he wishes it, throw it into the common share for division among sons (Viṣṇu, p. 652). So is the father's right to exclude from partition the gains of learning or valour that he may have made (Bṛhaspati, p. 652) ; and he is free to give them away (p. 653). Yājñavalkya (II, 114-115) rules that the father need not give equal shares to all sons, if he makes the division, and may give an extra share to the eldest son ; if he makes all shares equal, the wives shall get equal shares too, especially those who have had no *strīdhana* from parents or husband (p. 654).

#### *Spiritual reason for partition*

The śrāddhas to ancestors will be done by the father, when he is alive, and by the eldest son if all sons live together, and by each separately if they have separated after the division of the *riktam*. "Partition leads to increase of Dharma" says Gautama. The *material* gain of living united is noted by Śaṅkhalikhita (p. 651) who also notes that the sons may, if they like, dwell together, leaning on one another and desiring their common good. When sons dwell together, the worship of gods, Vaiśvadeva, reception of guests etc. are done by the head of the family. Personal religious duties, like the tending of the sacred fire (*agnihotra*), must be done by married sons, even in a joint family. It is pointed out by *Vīramitrodaya* (p. 557) that the worshipping of gods etc. should be done by the sons together ; and even when joint, the sons can each do *agnihotrā* and the *śrauta* and *smārta* rites with the aid of the common property. Entry into *gṛhasthāśrama* imposed duties that *must* be done by every one.

#### *Minority*

Kaṭyāyana (ed. Kane, 844-45) shows that though partition is allowed to majors usually, the minority of any sons is not a bar to partition. The property that should go to the minors, like that which should go to one who has gone abroad, should be kept (for them) by the divided brothers or relatives of the minors. The period of minority is that indicated for education. During it, the minors have to live with their elder brothers. This is interpreted by Aparārka as inhibiting partition till all brothers are majors (p. 722). Among authorities there is a difference of view as to whether minority ends with the beginning or the end of the sixteenth year. Pregnancy of the wife of a coparcener is no bar to partition, but as the sex of the unborn child is not determinable before birth,

Vasiṣṭha (XVII, 41) recommends the putting off of partition till pregnant wives of any co-parceners are delivered. Manu (IX, 216) rules that if a son is born to a coparcener after a partition of the family is effected, he inherits the shares of the father, which had been determined at partition.

*Preferential share (Uddhāra)*

Manu (IX, 112-114) lays down that the eldest son should get one-twentieth of the property as an extra share, one-half of it should go to the middlemost son, and one-fourth of it to the youngest. Lakṣmīdhara holds that the "eldest" son, who gets the additional share should be—not the eldest by age but the seniormost by good qualities (*guṇavat jyeṣṭhah*, p. 656). The older smṛtis recommend the *uddhāra*, and even say that the eldest son gets the whole property (Gautama, XXVIII, 3). It is to be noted that Medhātithi says that some people hold the view that *preferential shares* are not meant to be observed in the present age, and that they are on the same footing as the rule sanctioning the killing of the cow for offering the *Madhuparka*. He adds that "this view is not correct. No restriction of *uddhāra* is found anywhere." It is not among barred practices cited by Dr. Kane, in his "History of Dharmaśāstra" as *kalivarjyāh*.

Detailed descriptions of the extra shares or articles that the eldest son, the middlemost son and the youngest son should get at partition are given by almost all smṛtis, and are collected by Lakṣmīdhara. He must be held to share the view of Medhātithi in their applicability even in his day. The eldest son is to be given the best article in the property, as well as ten of the best cattle, as his extra share. If all brothers (including the eldest) are equally skilled in their occupations, there will be no extra share in the form of the best of the cattle 'among ten,' and only some trifle shall be given to the eldest son as a token of respect.

Seniority is not entirely by age; Lakṣmīdhara remarks that the awarding of *uddhāra* (extra share) should be on the basis of the eldest son being the 'best in good qualities as well as in seniority' (*guṇavat jyeṣṭhādiviśayaścāyamuddhārah*, p. 656). Gautama will give the eldest son a carriage yoked with animals that have two rows of teeth (*i.e.* horses) and a bull (p. 606); the middle-most son gets one-eyed, hornless and tailless animals, if there are several of them; and the youngest son gets the sheep, grain, iron utensils, one of each kind of animal, a cart yoked to oxen, and the family house. Curiously, the last practice has been followed by Syrian Christians in Travancore, who claim to have come with the apostle Thomas in the first century A.D. Āpastamba states that in some places (*deśa*) gold, black cows, and black products of the soil are the share of the eldest son, as well as the father's chariot and household furniture (p. 657). The assignment of certain things to middlemost and young-

est sons, and the indication of equal division of the remainder, indicate that animals, movables and the family house are excluded from the equal division of the property among sons. The assignment of an extra share to the eldest son is natural as he has to act as the head of the family when the father gets old and weak, and also officiate in family religious rites as its chief member.

*Partition among sons of different mothers :*

A householder may have more than one wife, of the same or of different *varṇas*, and have children by each or some of them. Seniority among wives will be according to the respective dates of their marriage, if they are of equal *varṇa* and of the same *varṇa* as the husband. The wives may give birth to sons at different times, and a junior wife (*kaniṣṭhā*) may beget a son or sons before the seniormost (*Jyeṣṭhā*). Which son is to be regarded as the eldest? The son born of the senior wife (*pūrvā*) is termed *pūrvaja*. Manu (IX, 123-124) rules that the son of the senior wife shall take as his preferential share (*uddhāra*) one bull, and the other bulls, which are not so good shall go to the other sons, as they will be deemed junior to him on account of their mothers being junior wives. 'Seniority among sons is determined by seniority among their mothers, and not by their own age' says Medhātithi in explaining these verses. An alternative preferential share is stated in the next verse of Manu thus: in addition to the bull (mentioned in the previous verse as his share) the son born of the senior wife (termed therefore 'Elder' or *jyeṣṭha*) will get fifteen cows, and the others according to the position of their mothers. But, in the following verse, (IX, 125) Manu has also stated that among sons born of mothers of the same *varṇa* ('equal'), seniority is not according to mothers but it is only by birth. Priority of birth is the determining factor (Rāghavānanda). Medhātithi has held that the two preceding verses (IX, 123-124) are declamatory (*arthavāda*), and that the later dictum giving seniority to one born earlier (irrespective of the position of the mothers) is Manu's *real* view. Kullūka has also noted the contradiction, and held that the apparent contradiction leaves room for option, *i. e.*, observing either rule, but selecting by the presence of superior qualifications the son to be held seniormost, in addition to his seniority in age. In the case of sons born of mothers of different *varṇas*, the son born of the wife who is of the same *varṇa* as the husband is the seniormost (*Vivādacintāmaṇi*, p. 200). Caṇḍeśvara (p. 658 *inf.*) points out that Lakṣmīdhara held that the son born of the senior wife is senior, and is entitled to the preferential share. This view is also upheld by the *Dāyanirṇaya*, 19-2-6. The determination of seniority among sons by birth is also applied to the case of twins (*yamala*) by Manu (p. 660). But even in regard to twins there has been difference of opinion, the later-born being regarded as the first to be conceived, as the result of the first seminal emission and therefore the elder (Rāghavānanda and Rāmacandra).

The opinion expressed thus is upheld by medical treatises in Sanskrit, like *Piṇḍasiddhi* and *Carakasamhitā*, as well as by the *Bhāgavatapurāṇa*. It is also the modern view, medically. But the *Vyavahāramayūkha* (p. 98), which cites these medical views, maintains nevertheless that Manu's ruling should be followed. Devala (p. 660) takes the common view that the child which comes out first is the elder.

Seniority may be lost by an eldest son by his ill-treatment of his younger brothers (p. 660). If a special share is given to the eldest (*uddhāra*), he gets two shares, according to Manu, his younger brother one share and a half, and the others one share each (p. 661). *Kṣetrajā* (son born by *niyoga*) is entitled to a share like ordinary sons (p. 661). Bṛhaspati introduces a new principle in unequal division. One 'superior in birth,' i. e., the older, as well as in learning must get two shares, and the others only one each. This indicates that seniority among brothers is not by mothers or by age alone. The rules for special shares are ignored by Yājñavalkya (II, 117), and he rules that sons should divide the property equally, after paying off the father's debts. Among coparceners shares are determined by fathers. Sons get their father's share in the property of the grandfather (p. 662). Partition of property and *piṇḍa* (*śrāddha*) offerings to the ancestors go together (Devala, p. 663).

Widows who have had no *strīdhana* should get some share. Bṛhaspati allots the widow a share equal to that of a son, and the daughter who is unmarried a fourth of such a share (664). According to Vyāsa a sonless daughter-in-law must get a share. Bṛhaspati declares that ancestors feel that they have descendants only when one or more of them earn a name for learning, valour, and practical knowledge of affairs, and a son with such qualities *deserves* to get a larger share than other sons (p. 664). The brother who manages the paternal estate should get in addition to his share some extra like fodder, conveyance, or food. A brother, well able to maintain himself otherwise, who does not wish to get his share of the father's property, may be regarded as separated after giving him a nominal share (Manu, IX, 207). The gift of this "trifle" is to establish the fact of partition and prevent future disputes. A rule of ethics, not mere law, enunciated by Āpastamba is that all virtuous sons get equal shares, and the one who squanders money in bad ways like gambling should be debarred from getting his share, and be given only a trifle as evidence of partition (p. 665).

#### *Persons disqualified to inherit (Vibhāgānarhāḥ)*

Certain persons by reason of physical or mental or moral defects are declared unfit to get a share in inheritance. Gautama rules that even a son born of the same *varṇa* as the father should not get the father's property, "according to some," if he is addicted to unrighteous ways. The word "even" in the *sūtra*



is explained as implying that when a person of the same *varṇa* as his parent is excluded because of his bad ways, much worse is the son, similarly acting, who is born of a mother of a different *varṇa* (p. 665). Manu has laid down the general rule that all who follow forbidden practices are debarred from inheriting the father's wealth. The outcaste (by reason of the actions which have made him one) is prohibited from inheriting, as he is also prohibited from offering funeral cakes and water to his father or ancestors (*Śaṅkhalikhita*, p. 666). What use, asks Brhaspati, is he, who is neither learned nor righteous nor austere nor charitable? One who treats his father as an enemy, or who hates him (*pitṛdviṭ*) is excommunicated, for such crimes as regicide, by his relations by the 'breaking of pots' (*ghaṭāpavarjana*). (Nārada, p. 668). According to Kātyāyana, one who having become an ascetic has renounced asceticism (*pravrajyāvasitāḥ*) or is born of a mother of the same *gotra* as the father (*sagotrādyasā jāyate*, p. 669), is also excluded from inheritance.

Physical defects that make one less than human also disqualify for inheritance. Sons born blind, deaf, or dumb or insane or idiots or devoid of sensitiveness to touch or thought are also barred. But if one becomes impotent during married life, his children are entitled to inherit (Manu, IX, 203). Yājñavalkya (II, 140) bars from inheritance the person born lame (*paṅgu*) or with incurable disease like leprosy (p. 667). Devala bars the *liṅgi*, who makes a living by cheating at miracle-working (*aliṣayena kapaṭavṛttacārī*) from inheritance. The son of an outcaste, as he is also one, is barred.

The disqualified persons have however to be maintained by those who inherit the property. So are the *aurasa* and *kṣetraja* sons of these, with the exception of the son of the *palīta*, if born after the father was sent out of caste. Impotence is defined as inability to impregnate. The right to maintenance of the wives of persons thus disqualified depends on their remaining virtuous. Adulteresses should be 'sent out' (*nirvāsyāḥ*). Children from *pratiloma* unions are disqualified from inheriting but they too must be supported by those who get the property. *Amuloma* sons alone can inherit.

#### *Performance of Sacramental Rites (Asamskṛta-samskaranam)*

Sacraments are compulsory. They are described in detail in *Gr̥hasthakaṇḍa* and *Brahmacārikāṇḍa*. Boys and girls have sacraments, but marriage is the chief for girls. The sacramental rites that have not been done for sons, at the time of the father's death, must be performed by the brothers, out of the parental estate. If there is no parental property, the sons should still perform the sacrament from their own resources. *Upanayana* is the chief sacrament of a boy. Marriage is obligatory to girls but not to boys, as after finishing their education they may decide to remain celibate for life (*Smṛticandrikā*, p. 628). The sacraments should be performed for sisters, after giving them the one-fourth

share in the father's property, as well as the ornaments and *strīdhana* of their mother. The money needed for a daughter's marriage must be found by her brothers, either out of the undivided parental property, and if she was born after the partition the wealth needed for her marriage shall be given by the brothers (*Vibhāgasāra*, Jha, II, p. 394). The marriage should be celebrated in accordance with the manner suited to the property left (*villānusāreṇa*). The daughter does not merit a share of the estate, like brothers, says Baudhāyana (p. 672).

*What is divisible (Vibhājyam)*

At the time of partition the property of the grandfather, the father and what has been earned or obtained by the sons, with the help of ancestral property, are divisible among the claimants. Before partition the amount needed to repay the father's debts and promised charity (*dāna*) must be taken out of the estate, and the remainder alone is divisible. The father should not remain a debtor after death. Whatever debt has been contracted for the sake of the family by brothers, paternal uncles or the mother should be first cleared before partition takes place (*Kātyāyana*, 846). The debts incurred by one of the coparceners for religious purposes (*dharmārtham*), or for making a gift out of affection to some one (*prītidattam*) or debts contracted by himself shall be excluded from partition, and remain to be repaid by him who contracted them. All ascertainable assets of the father must be divided, and if any are suspected as concealed it must be discovered by ordeal. The odd goat or sheep or animal with uncleft hoofs (horses, mules, asses etc.) need not be divided; but must go to the eldest brother (p. 674).

*What cannot be divided (Avibhājyam)*

The gains of learning, or of valour, friendly gifts made to him, marriage presents (*audvāhikam*) and presents made to him when he is treated as an honoured guest to whom *madhuparka* is offered are the exclusive property of the recipient and cannot be divided with co-parceners. Ancestral property recovered solely by his efforts must belong to him who regained it. (p. 674). Gains of learning can be shared only when paternal property has helped in gaining it (by qualification). Whatever is given to the bridegroom at marriage is held to be the property of the bride, and is not to be partitioned. The wife's own property, received from mother or sons, cannot go into the common stock for division. The prize won in an assembly of pandits, as the result of a wager, the gifts received from a pupil as *guru*, or fees gained in a sacrifice or a prize obtained in a public disputation, or by *dāna*, are impartable. A craftsman who gets over and above the price of an article which he has made an additional amount as a prize, is also said to get *vidyāadhanam* and it is entirely his, and not

to be shared (p. 677). What is gained in battle is termed *dhvajāhrytaṃ* and is also not to be shared (p. 678). Śaṅkhalikhita declare that Prajāpati holds that a house (*vāstu*), water vessel (*udakapātra*), used clothing, a kept mistress and water drains are not to be shared by division (p. 678). Viṣṇu holds that ornaments, a riding animal, cooked food, water in a well or pool, slaves or mistress kept by a father, property destined for pious uses or sacrifices, a common pasture ground, and in the case of kings, ministers and purohita are not partible. These last are termed *yogakṣema*. Halāyudha interprets *yoga* as boats, and *kṣema* as fortresses (p. 679). Bṛhaspati on the other hand argues that cloths and ornaments can be sold and the sale proceeds divided between coparceners; that a slave girl can be made to serve coparceners by turn; and that a common pasture may be used by coparceners according to their shares. Lakṣmīdhara reconciles the dicta of Bṛhaspati with the interdiction by Manu and others regarding the indivisibility of clothing and ornaments by noting the difficulty of dividing them without making them lose their natural form (*svarūpa*). Gains acquired by valour of those who obtained learning and training from help given by grandfather, father or relations, are partible. Vyāsa holds that what is earned from conducting sacrifices, from land, cooked food, water and women is not partible among *sagotras* 'even upto a thousandth degree' (p. 679). The *Mitākṣarā* says that the restriction on partitioning land applies only to its being done by a Brāhmaṇa's children by a non-Brāhmaṇa wife. Kātyāyana and Kauṭilya (p. 45) lay down a general rule that the disposal of inheritance should be according to whatever usages are in force in the country (*deśa*), caste (*jāti*), or association or village to which the parties belong. It means that usage or rules in corporations accepted by members overrule the ordinary law. Vaṣiṣṭha states that if one brother gains something by his unaided efforts, he should receive a double share of ancestral property into which his gains have been incorporated (p. 682). If without the help of the parental estate the eldest son acquires some wealth the younger brothers have a claim to a share of it, if they are also devoted to learning (Manu, IX, 204). Property which is not parental but has been built up by the labour of brothers, none of whom is specially learned, should be divided equally between them (Manu, IX, 205). If any member of a family acquires by bravery or other qualifications any such property as conveyances or weapons these should be divided among the brothers, the acquirer of them getting a double share (Vyāsa, p. 683).

Kingdoms cannot be partitioned. Manu (IX, 323) rules that a king after making gifts to Brāhmaṇas, and installing his son as king, should retire to the forest. Vyāsa (cited in *Vibhāgasāra*, 9, 1.2) states that it is the eternal law that among kings so long as the elder brother is alive the younger cannot be king. Indivisibility and primogeniture are to be observed in kingdoms.

### *Strīdhana ( Wife's Separate Property )*

The exposition of the things that are not to be divided by the coparceners on the death of their father, naturally leads to a special case of non-divisibility, viz., the woman's separate estate, or *strīdhana*. The famous statement of Manu ( VIII, 416 ) that the wife ( *bhāryā* ), son ( *putra* ) and slave ( *dāsa* ) are property-less ( *adhanāḥ* ) merely indicates, as Medhātithi has explained, that they are dependent, and that the wife should not expend her property for any purpose without her husband's permission and the son without his father's sanction. Lakṣmīdhara treats of the disposal or use of *strīdhana* ( *kṛtya* ) before describing in detail the nature and kinds of *strīdhana*. For reasons of clarity we may proceed to his treatment of the nature of *strīdhana* and its divisions ( pp. 693-695 ) first.

#### *Strīdhanalakṣaṇam*

Manu's description of the kinds of *strīdhana* is given first. It is said to consist of six kinds, viz., what is given a wife before the sacrificial fire ( *adhyagni* ), what is given at the time of departure of the bride to her husband's house ( *adhyāvahānika* ), what is given her by the husband out of love or in dalliance ( *dattam prīlataḥ* ) and what has been given by mother, father and brothers. Commentators have made it clear that the list is not exhaustive. It is more, but it cannot be less, as it will mean omitting six essential sorts. The gift out of affection ( *prīlataḥ* ) is made to the bride, when she makes her bow to her parents-in-law. It is termed *lāvāṇyārjita*, 'earned by beauty,' or *ādhipedanika*. The *Vivādacintāmaṇi* ( pp. 215-216 ) makes this a seventh kind and not treated as a synonym for *prīliddatta*. Viṣṇu ( p. 693 ) adds to the number of gifts made by sons, what a husband gives when a wife is superseded ( *ādhipedanika* ), what relations ( *bandhu* ) present her during her wedding ( *anvādhēyaka* ) and *śulka* ( defined by Kātyāyana on p. 695 as ' the price received for household utensils, conveyances, milch-cattle, ornaments and servants, from the husband ' ) and by the *Mitākṣarā* as the fee paid when the girl is given away. All that a girl obtains at marriage or after it at the house of the father or husband is termed *saudāyika* ( Vyāsa ). Thus, there are ten kinds of *strīdhana*. Devala ( p. 693 ) states that four kinds of wealth constitute *strīdhana*, viz., property given for maintenance ( *vṛtti* ), ornaments ( *ābharanam* ), *śulka* ( usually rendered as ' fee ' ) and gifts ( *lābha* ). *Vṛtti* is rendered ( also *vṛddhi* ) as gifts by father and others for maintenance and *lābha* as what is obtained for propitiating the goddess Gaurī.

#### *Use of Strīdhana ( Strīdhanakṛtyam )*

Wives should not draw wealth from the family and hoard it, or do so out of their own property without the sanction of the husband ( Manu, p. 683 ). The *dāyādah* ( heirs ) should not divide the ornaments worn by a woman during the

life-time of their husbands, as by doing so they will 'fall' (p. 683). What has been given to her by her husband she can enjoy after his death, as she likes, except immovable property (*sthāvarādṛte*) given during marriage. According to Jīmūtavāhana other immovable property she can give away as she likes (Jha, II, p. 547). The maximum limit to the gift to the wife is 'two-thousand,' which the *Mayūkha* interpretes as an *annual* amount (p. 854). *Saudāya* means every kind of gift received at marriage and is "dowry". Lakṣmīdhara defines it as what has been obtained by a woman from the paternal and maternal families (p. 685). Even in immovable property so obtained a wife (or widow) has absolute right of disposal (p. 685), by gift or otherwise, and this power is exercisable in what has been given by the husband, with the exception of immovable property (*sthāvarātirikṣeṣu*). The king should protect barren women, women who have lost their children, women who have lost all their relations on the paternal and maternal sides, and chaste women in distress, from relations who try to appropriate their possessions; and those who do so must be punished (Manu, p. 685). A husband may use his wife's *strīdhana* when he is in distress but he must later on repay it (Devala, p. 686). No member of the family, husband or other, has right to spend a woman's *strīdhana*, and if he does so he must be made to repay it with interest, and be also punished. If, however, it has been spent with her consent, the repayment will be without interest (p. 686). If a wife lends her *strīdhana* to a husband who is ill, or in distress or worried by creditors, he must later on repay it to her; so also during famines or when wealth is needed for religious duties (Yājñavalkya, II, 147, p. 687). A wife who is superseded by a second wife, with whom the husband begins to reside, cannot be forced by him to give him her *strīdhana*. If she is denied food, clothing and residential accommodation, she may exact her own *strīdhana* from him as well as the husband's potential share from coparceners. But she must reside in her husband's house, unless afflicted by disease, when she may go away to her kinsmen. *Strīdhana* promised a wife by the husband must be made good by his heirs (p. 687).

#### *Division of Strīdhana (Strīdhanavibhāgaḥ)*

The mother's property other than *strīdhana* is described as *mātṛkaṁ*. Such property should be divided equally between brothers and sisters on the death of the mother. Even the daughters of daughters (*i. e.* grand-daughters) may get a small share (*kiñcit*) as a mark of affection. *Anvādheya* of the dead wife shall go to her children as well as gifts made to her by her husband from love (*prītyā*)—if she predeceases the husband. *Strīdhana* is inherited by unmarried daughters and sons; a married daughter receives only a trifle as a mark of honour (Bṛhaspati, p. 688). Gautama assigns *strīdhana* of a dead mother first to unmarried daughters, and next to daughters married to poor husbands, *i. e.* unlucky

daughters. The toilet articles (*phāriṇāhyam*) of mothers go to daughters. (Vasiṣṭha, p. 689). The mother's debts must be paid before the division of *strīdhana*. In the absence of daughters, their children will inherit *strīdhana* of their grandmother (Yājñavalkya, II, 117). It should go to a 'daughter ready for marriage' (*vivāhārā*, p. 689). If a dead wife had co-wives and dies childless, her property will go, if she was a Brāhmaṇa wife, to a daughter of a Brāhmaṇa co-wife. When there are no daughters, the dead wife's property goes to her sons, and her *saudāyika*, to the husband. The sisters and their husbands shall divide the property, when there are no daughters or daughters' children. In the absence of sisters the agnates (*bāndhavāḥ*) will inherit the property. Sisters, who are widows, are excluded by the restriction to 'sisters with husbands' (*sabhartṛkāḥ*).

#### *Succession to a Childless Woman's Property :*

A woman who dies childless may have been married in one of the different ways mentioned in *smṛtis*. Manu (p. 690) states that in the *brāhma*, *daiva*, *gāndharva*, *ārṣa* and *prājāpatya* marriages, the husband gets her property. But if their marriage had been in the *āsura* form, in which money is paid to the parents of the bride by the bridegroom, the property of the dead woman will go to her parents (p. 690). Jimūtavāhana holds that only the wealth that came to her at marriage should go to the husband (*Dāyabhāga*, p. 88). Mitramiśra in his commentary on Yājñavalkya (p. 622) holds that an 'option' is given, by the rule, and that both husband and father should divide the property equally. Aparārka thinks that in Gāndharva and lower forms of marriage it may go either to the husband or to the parents. Devala affirms that a dead woman's *strīdhana* belongs in common to sons and unmarried daughters. If she dies childless, it goes to her husband, mother, brother and father in order (Devala, p. 691); in inferior forms of marriage the property of a dead woman, married in the *āsura* and other lower forms of marriage, her wealth goes to her brothers, after her mother, or according to some, even when the mother is alive (Gautama, p. 691). The relations (*bāndhavāḥ*) get the dead woman's property so far as it comes from gifts from relations, or *śulka* or *anvādheya* (property presented to bride by relations), if she dies without offspring (Yājñavalkya, II, 144). If a *putrikā* (appointed daughter) dies sonless, her property goes to her husband (p. 691). Caṇḍeśvara (p. 620) states that the rule will apply only where the dead *putrikā* has no unmarried daughter or sister, as pointed out by Paiṭhīnasi (p. 691). If a person, who having verbally given away a daughter, later on takes her away, without any defect in the bridegroom, he should be punished by the king, says Yājñavalkya, and must be made to pay all the expenses incurred by the bridegroom, with interest. But if the girl dies, the father and the bridegroom should work out their relative expenses, (*i. e.* what has been given to the bridegroom's

parents by the father of the girl as honorific present, and what has been given to the father by the bridegroom's people), and the balance that may be due to one or the other party should be paid to him (p. 692). The rule, according to all commentators, applies only when the father of the girl takes her back without a good reason, such as the availability of a better bridegroom, which is allowed by *smṛtis*.

Brhaspati equates the sister of the mother, the wives of the paternal and maternal uncles, the father's sister, the elder brother's wife and the mother-in-law. If these have no legitimate son 'of the body' (*aurasa*) nor step-son, nor a daughter's son, nor a son of these, then their sister's son and the rest shall inherit their property (p. 693).

#### *Mistakes in Partition (Avalupta-vibhāga)*

If some omission of assets is discovered after partition, the discovered assets should be distributed equally among the coparceners (Manu, p. 695). But there will be no special share for the eldest in this. Articles concealed by a coparcener and discovered later shall be redistributed between brothers or their sons. An erroneous partition should be remade. What a man acquires after partition is wholly his. Lost property that is recovered after partition should be partitioned (p. 695). If property has been taken away by a kinsman, he should not be forced to restore it; among undivided kinsmen, possession should not be set aside (Kātyāyana, p. 696). The meaning of this is that conciliatory means should be used to make the person give back for redivision the property he has appropriated. Caṇḍeśvara interprets it as meaning that instead of force, tricks should be used to get back the property for redivision (p. 526). Among undivided relatives, no one should be required to make good what he has enjoyed. Brhaspati advises also conciliatory methods to get back for redivision property that has been deceitfully taken possession of by a coparcener (p. 696). Even by expenditure of one's money and by cunning persuasion should cheats, cruel men and avaricious men, who have taken property that should have been divided, be made to give back for redivision such property (p. 696).

#### *Division of Property between sons born of mothers of different varṇas (Nānāvārṇasamavāya-vibhāgaḥ)*

If a man marries only wives of his own *varṇa* the division will be *per capita*, among sons. But marriages that are allowed are of *anuloma* type *i.e.*, the wife is of equal or lower *varṇa* than the husband. *Pratiloma* unions are forbidden, but they may result in offspring. For children of such unions, the simple rule laid down is that he will get the same share as a Brāhmaṇa's son by a Śūdra wife, *i.e.* the lowest. Gautama has laid down that a Brāhmaṇa who dies with no son by his Brāhmaṇa wife, but has left a son by a Śūdra wife, will leave to the Śūdra wife's son, if he is docile and well-behaved, only provision

for maintenance out of his estate ( p. 704 ); the *sapindas* shall take the rest of the property ( Br̥haspati, p. 794 ). Among Śūdras the son born of an unmarried woman (*anūḍhāyam*, the reading of *Vivādaratnākara*, p. 542 ) or of an 'unauthorised' woman is like a legitimate son. The son of the Śūdra by a female slave or the female slave of a slave (*dāsadāsī*) shall receive a share according to the Śūdra father's wish ( p. 704 ), but if the father dies before giving him the share, the brothers will allot him half-a-share, and if there are no such 'brothers' he shall take the entire property ( Yājñavalkya, II, 134 ) unless daughters' sons exist to the dead Śūdra, who will have to be treated as legitimate sons. In the case of sons to Br̥hmaṇas by slave women, they are only entitled to maintenance ( Medhātithi, IX, 179 ).

*Share of Son born after Partition ( Vibhaktiṇa-vibhāgaḥ )*

If a partition has been made between a father and his sons during his ( i. e. father's ) lifetime, the father gets a double share ( Medhātithi, IX, 216 ). If a son is born after this partition, or sons, they will inherit only the father's share. But if there has been a reunion of some sons with the father, the shares will remerge, and the sons born after partition will only get such share as any other son gets, in the remerged group. The self-acquired property of the father, taken by him on division with his sons, will go after his death to the son or sons born after partition. Separated brothers have no concern with each other, after the partition in regard to property, debts, gifts and pledges etc., which have had to be taken into account before division. Their only contact thenceforth is pollution for birth and death among cognates ( Br̥haspati, p. 705 ). If, when a partition takes place, a son is in the womb and is not suspected to be so, and is born after the partition takes place, he must get from the divided brothers a share which will be equal to theirs, after a redivision. The case of a son conceived after partition is different. He can get only his father's share, and none of the divided brothers' ( Lakṣmīdhara, p. 706 ).

*Revision of Partition ( Vibhaktiṅgata-vibhāgaḥ )*

When an heir, whose identity can be established by testimony, turns up after partition has been made in his absence, he must get a share of what had been his father's father's property. He may have long been away from his native place, and the partition taken place in his absence. His share must be given to him by the others, if he comes and claims it, or to his descendants, even upto the seventh degree, if they do so. It has been ruled ( by Devala, Jha, II, p. 60r ) that there can be no repartition after the fourth degree, but this refers, as pointed out by Candēśvara in *Vivādaratnākara* ( pp. 540-541 ), only to cases where all coparceners have lived together, and not to cases in which coparceners have gone out of view in a foreign land or in accessible places, and the partition has had to take place without them.



### *Description of Types of Sons (Putralakṣaṇam)*

Lakṣmīdhara deals with the rights of different types of sons (*putrāḥ* be-) fore describing the types. The description of classes of sons and of the glory and value of sons, should logically precede the description of their rights to heritage.

There are thirteen types of sons. These are (1) *aurasa*, legitimate son; (2) *kṣetraja* or 'soil-born' son, begotten on wife by another than the husband; (3) *putrikāputra*, son of an appointed daughter (*putrikā*), who is treated as a son; (4) *paunarbhava*, son of a remarried woman (widow or wife abandoned by husband), whether virgin or not; (5) *kānina* (maiden-born), the son of an unmarried daughter, born of lust secretly, in the father's house who may be the son of a father of the same caste as his mother or not; (6) *guḍhotpannaḥ* (son born in secret), the son born in a house without any one knowing who procreated him; (7) *Sahoḍhaḥ* (received with bride), the son of a girl who was pregnant at the time of marriage, without its being known or not, to the husband; (8) *Dattakaḥ* the gifted son, or adopted son; (9) *Kṛitaḥ* (bought son), *i. e.* the son bought of either or both his parents, whether of the caste of the buyer or of lower caste; (10) *Svayamupāgataḥ* (self-offered), *i. e.* a parentless boy who offers himself as a son and is accepted as such; (11) *Apaviddhaḥ* the cast-off or forsaken son, accepted as a son by another; (12) *Kṛitrimaḥ*, or appointed or created son; (13) *Śūdrā-putraḥ*, the son of a married or unmarried Śūdra woman, born of lust to one of a higher varṇa and termed also as *pāraśava* ('a living corpse') or *Śaudra*.

The order of the enumeration of the thirteen types of sons by Lakṣmīdhara is not throughout that followed by Manu, Yājñavalkya and Nārada, and the thirteenth (*Śaudra*) is not included in the list of "sons" by Gautama, Hārīta, Yājñavalkya, Nārada, Viṣṇu and Yama. *Kṣetraja*, who comes second in his list, gets the second or third place in the smṛtis. *Putrikāputra* who comes second or third in all lists except Gautama's, is second in Lakṣmīdhara's. The fourth place given by him to *paunarbhava* is so assigned by Viṣṇu, Vaṣiṣṭha, Śaṅkhalikhita and Yama. He follows Vaṣiṣṭha and Viṣṇu in giving the adopted son of modern times (*dattaka*) a low place, *viz.* the eighth. Manu did not include *putrikāputra* in his list. *Śaudra* is, according to Nandapaṇḍita, *yatra-kvacanot-pādita* (procreated anywhere) of Viṣṇu. Bṛhaspati recognises that the only sons that can continue the line (naturally) are the *aurasa* and *putrikā*.

Śaṅkhalikhita (p. 712) count *aurasa*, *kṣetraja*, *putrikāsutaḥ*, *paunarbhavaḥ*, *kānina* and *guḍhotpannaḥ* as *dāyādāḥ* (kinsmen and heirs) belonging to the same *gotra* as the father and grandfather, and partaking of their *pinda* and water offerings, and their property. Their rule of the division of the inheritance is this: make ten shares of the property: of these two should go to the father, two to the

*aurasa*, three to the *kṣetraja* and *putrikāputra* together (i.e.  $1\frac{1}{2}$  shares each), and one each to the rest. The *uddhāra* to the eldest son should go to the eldest *aurasa*, and if he is not existing, to the *kṣetraja* and *putrikāputra*. If the six do not exist, the other six whom Śāṅkhalikhita do not recognize as heirs may get shares according to differences in their qualities (p. 712).

Gautama places the order of succession to property as follows: *aurasa*, *kṣetraja*, *datta*, *hṛttrima*, *guḍhotpanna*, and *apaviddha*. The others inherit, in the absence of an *aurasa* son, an one-fourth. *Vivādaratnākara* (inf, p. 713) explains that the difference between the rule given by Gautama and that laid down by Śāṅkhalikhita is due to the stress on sons of the same or of different *varṇas* from the father, whose property has to be inherited. Vasiṣṭha (p. 713) declares that the six (preferred by Śāṅkhalikhita above) are relations and dividers in heritage (*dāyādāḥ*) and saviours of the ancestors from 'grave fear' (*mahato bhāyat*). Gautama declares the *sahoḍha* to be the first among the relations who are not coparceners (*dayādāḥ*) (p. 713). Lakṣmīdhara ascribes the exclusion of *paunarbhava* and others from inheritance as only intended to exclude those who are not of the same *varṇa* as the person whose property has to be divided (p. 713), as explained by Kātyāyana thus: on the birth of a legitimate son (*aurasa*) the other sons are entitled only to a third (or fourth) part of a share, if they are of the same caste as the father, and, if not, only to maintenance. Caṇḍeśvara notes that in Vasiṣṭha's text the others are assigned only a fourth of a share, whereas Kātyāyana will give them a third of a share, and this differentiation is due to the higher proportion being for sons with superior qualifications, and the provision of bare maintenance for those who do not belong to the *varṇa*, and are not specially qualified. Mere subsistence is for those who are not of the father's *varṇa*. The estate shall be taken by the second six types of sons, when none of the first six types is available. Hārīta describes the first six as both heirs and kinsmen, while the last six are heirs but not kinsmen (p. 713). The *svayamdattaḥ* is termed '*sahasā dṛṣṭaḥ*' by Hārīta (p. 713). The first six are ordinary sons and the other six subsidiary sons. The subsidiary sons cease to be heirs as soon as an *aurasa* son is born. Viṣṇu notes that among the twelve sons mentioned in order by him (as by Lakṣmīdhara *infra*) each preceding son takes the heritage before the one that comes after him. The funeral cakes should be offered by each type of son, in the absence of sons of the preceding type (Yājñavalkya, II, 132).

Brothers and fathers do not inherit a man's property as sons do. (Manu, IX, 185). If there are more sons than one son in a group, they will all inherit and share the heritage.

He who giving up his family goes into another family is termed *kāṇḍa-prṣṭha*, the family, being termed *kāṇḍa*. The term is applied also, as opprobrium,

to the *svayamdatta* (self-offered son), the son who has been bought (*krīta*) and the son of a *Śūdra* wife or concubine (*Śaudra*).

The son begotten on the wife of another man, after due sanction, whether alive and impotent, diseased or a eunuch, is *kṣetrajā*. He has two fathers, the nominal and the real, and is held to belong to two families, with the right (according to Baudhāyana and Yājñavalkya II. 127), to offer *śrāddha* to both 'fathers,' to perform their funeral oblations and to inherit their properties (p. 721). Viśvarūpa (p. 721) notes that *niyoga* is forbidden to the Brāhmaṇa female only, and not to the male, and a Brāhmaṇa can beget a *kṣetrajā* on a Kṣatriya female or females of lower castes. If the brother-in-law or other, who procreates a son on the brother's wife, has no son, the son so born is the son of both, inherits from both and offers *śrāddha* to both and is named *Dvayamuṣyāyana*; but if the authorised person has a son of his own already, and begets the son (*kṣetrajā*) solely for the benefit of the brother, the son so born does not *always* inherit the property or do the *śrāddha* of both, unless there has been an express understanding between the nominal father and the procreator that the son will belong to both (Manu, IX, 538, p. 722). This is the interpretation of the Mitākṣarā and Caṇḍeśvara (*Vivādaratnākara*, p. 556). The smṛtis repeat the statement 'the soil without the seed can produce no crop; and the seed without the soil cannot grow.' Hārīta requires the first *piṇḍa* to be offered by the *kṣetrajā* to his procreator, or the names of both fathers may be uttered in connection with the same *piṇḍa* (p. 723). When a legitimate son is born after the *kṣetrajā* (i.e. in the father's lifetime), the *dvaimuṣyāyana* shall take half the property of both fathers (Nārada, p. 723).

Śaṅkhalikhita say that one may not like to marry a *putrikā*, when she is an only daughter also, as her son may be treated as the son of his father-in-law, and not his (p. 724). The *putrikā* inherits the *strīdhana* of her mother. If a son is born to the *putrikā*'s parents, after her appointment as *putrikā*, and this son dies sonless, his shares will go to the *putrikā* as she is equal to a full brother. Manu rules that the son of a *putrikā* should offer the first *piṇḍa* to his mother, the next to her father, and the third alone to his father (p. 728).

The son of a woman who has been deserted by her husband or has been widowed and then marries again is *paunarbhava*. She may or may not be a virgin at remarriage (Yājñavalkya, II, 130, p. 728). The remarriage may take place if the first husband is impotent (*hlība*) or an outcaste (*patita*). Her son belongs to his begetter (Kātyāyana, 860).

The *kānīna* is the son of an unmarried woman, who begets him from lust (*kāmā*). If her paramour is of her own *varṇa*, the son becomes the heir of his maternal grandfather (*mātāmaha*, p. 729). If a girl whose has been married

but the marriage rites have not been fully performed (*asamskṛtā*), if she begets a son by another, the son is a *kānina*.

The secretly born son (*gudhotpannaḥ*) is the son of a married woman, who has had connection with many men, and does not know by whom she was impregnated. If they have been all of her *varṇa*, this son shall be treated as his mother's husband's (p. 730).

If a girl, already pregnant, who has been married as if she was a virgin, and gives birth to a son, he belongs to the man who married his mother. He is *sahodha* (obtained with the wife).

### *The Adopted Son (Dattakaḥ)*

According to Manu (IX, 168) if the mother *or* father gives away a son (to another) with water libations (to sanctify the gift), a worthy son of equal *varṇa* (*Sadṛśam*) to another man, in times of distress (*āpadi*) as his son, that son must be regarded as 'adopted' (*datṛima*) or 'given' (*dattaka*). Medhātithi interpretes *sadṛśam* as 'equal by virtues, *not* caste,' and affirms that it is open to give a *kṣatriya* as a son to a Brāhmaṇa. The 'time of distress' is interpreted as 'times of famine' or the adopter's distress by want of offspring (Aparārka, 738). The distress must be of the recipient, not of the donor, *i. e.* when he has no son. *Vīramitrodaya* (p. 609) holds that one who gives away his son under normal circumstances incurs sin. Kullūka and other commentators hold that the boy must be of the same *varṇa* as the adopting father, as against the view of Medhātithi that a *kṣatriya* son may be adopted by a Brāhmaṇa. The śloka of Manu, as given by Lakṣmīdhara, has '*mātā pitā vā*,' which means that *either* parent can give away the child, but it is pointed out by Medhātithi that the child belongs to both parents and cannot be given away by one of them without the consent of the other. In Yājñavalkya (II, 130) the word *vā* appears, and it implies that *either* can give the child away, but in view of the definite ruling of Vasiṣṭha (below) that 'the wife cannot give away or adopt except with the permission of the husband' this clause or condition should be added, and the mother's adoption of a boy is valid only when the father is no more. *Bālabhāṭṭi* states that if the adoption is *urgently* needed, the boy may be given away by the father without the mother's consent (Jha, II, p. 214); if the mother is dead or insane the father can give away the child, and if she is all right and in the house, it can be done only with her consent. *Vyavahāramayūkha* notes that it is only a boy, not a girl, that can be adopted (pp. 107-109), as is shown by the use of the masculine pronoun in Manu's text.

Manu (IX, 141-142) adds that the adopted son, if endowed with good qualities, should inherit the adopter's property even if he comes from another

*gotra* (*anyagotrājāḥ*, p. 731).

The adopted son takes the *gotra* of the adopting father. The *pinḍa* (funeral cake) follows the *gotra* and the property. The spiritual reason for adoption is to secure for a sonless man the funeral offerings from a son got by gift (*dattaka*), i. e. by adoption. The cynical view of J. D. Mayne (*Hindu Law*, 9th ed. p. 131) that notwithstanding the spiritual benefits that are supposed to follow from the practice, it is doubtful if adoption would have been heard of, if the adopted son did not also become an heir. "Paupers," says Mayne, "have souls to be saved, but they are not in the habit of adopting." Mayne reads the present into the past.

"The whole Sanskrit law of adoption" remarks Mayne, "is evolved from two texts and a metaphor. The texts are those of Manu and Vasiṣṭha. The metaphor (if it is not itself a mistranslation) is that of Śaunaka that the boy to be adopted must be the *reflection* of a son." (ib. p. 137)

The rules of Vasiṣṭha are as follows:—

"Man is formed of uterine blood and virile seed, and proceeds from his father and his mother as an effect from the cause. (Therefore) the father and the mother have the power to give, sell or abandon (sons). But let him not give or receive in adoption an only son, for he must remain to continue the line (*santāna*). A woman should not give or receive a son, except with the sanction (*anujñā*) of the husband. He who desires to adopt a son shall assemble his kinsmen, announce his intention to the king, make burnt offerings (*hutvā*) and reciting the *vyāhṛti* rites take as a son a not remote (*adūrabāndhavam*) kinsman, and one just the nearest among the relatives." (pp. 736-739)

The reading *asannikṛṣṭam* ('who has no near relations') is adopted by Lakṣmīdhara in the quotation from Vasiṣṭha instead of *bandhusannikṛṣṭa* ('in the presence of relations'). Caṇḍeśvara follows Lakṣmīdhara, and the *Vyavahāramayūkha* follows both.

The prohibition of a wife adopting without her husband's permission is interpreted as relating to a sonless widow, whose husband died without giving her permission to adopt. Mitrāmīśra (*Viramitrodaya*, p. 609) takes the prohibition as applying only to a widow, who has co-wives with sons, since, for ritualistic purposes, a co-wife's son is as effective as an own son. If the widow was the only wife of the deceased husband, and is sonless, she *must* make provision for her *śrāddha* and funeral rites, and she may therefore adopt a son even if she had not obtained the husband's permission. *Vyavahāramayūkha* (p. 120) will permit her to adopt with the sanction of the 'father,' i. e. the husband's father.

*Kālikāpurāṇa* is cited for two rules: a boy whose *samskāras* from *jāta-karma* to *śūdrākaraṇa* have been done in the parental home cannot be adopted,

and therefore the boy to be adopted must be under five years of age. According to Śaunaka the adopter and the adoptee must be of the same *varṇa*, though, it may be remembered that Medhātithi allows a *kṣatriya* to be adopted by a Brāhmaṇa. He also prohibits the adoption of an only son, which is in accord with the high praise Manu bestows on the son. *Vyavahāramayūkha* rejects the verses from *Kālikāpurāṇa* as unauthentic, and holds that the prohibition can apply only to adopting a boy of a different *gotra*. In the three *dvija-varṇas* a boy whose *upanayana* has been done cannot be adopted, and among Śūdras a married man cannot be adopted.

Another rule of Śaunakā is that the boy adopted must be *putracchāyā*, 'a reflection of a son.' This is explained by Nandapaṇḍita thus: the resemblance lies in the possibility of being procreated by the adopter himself, as by *niyoga*. A brother's son, a sapinda's son or a sagotra's son can be adopted, because offspring can be raised on their wives by *niyoga* by the adopter. But sex relations with the mother, grandmother, sister, daughter or mother's sister will be barred as incestuous. So none of their sons can be adopted, e.g., a brother, an uncle, a nephew, a grandson by the daughter or a half-brother. The rule contravenes natural sentiment which will favour the adoption of a sister's son, or a younger brother, or a grandson by a daughter.

Though adoption is said to sever the adoptee from his natural family, the relationship continues in some respects. The adopted son cannot marry a girl of his old *gotra* as he cannot marry one of the *gotra* of his adopted father. The adopted son has to observe death pollution for his natural parents. The adopted son can do his natural father's *śrāddha* if there is none else to do it.

Notwithstanding what has been said above, Śaunaka allows a Śūdra to adopt his daughter's son and sister's son (Jha, II. p. 219). The religious rites that have to be done when an adoption is made have raised doubts as to the competence of Śūdras to make adoption. The objection is met by the argument that the Vedic rites might be done for Śūdras through Brāhmaṇas. The rites are indicated in *Vyavahārāmāyūkha*. The *upanayana* of the adopted son has to be done in the house of the adopting father. Among Śūdras, as there is no *upanayana* the upper limit for adoption is held to be the marriage of the adopted boy, who must be married only after adoption.

#### *Putratvavicārah (Consideration of Filial Relationship)*

Lakṣmīdhara discusses on the basis of authorities, the nature of filial relationship (pp. 737-740). If a wife is impregnated by one other than the husband, and gives birth to a son, to whom does the son belong, and whose line does he extend? Vasiṣṭha has stated the divergent views on the subject:

"Some say that the son belongs to the owner of the soil (*i.e.* the wife), and others to the begetter." The risk of a man losing the advantages of sonship is shown in a Vedic passage cited by Āpastamba (p. 737). "Guard carefully your line lest a stranger's seed be sown on your soil; in the next world the son belongs to the procreator, and an imprudent husband finds sons thus begotten of no help to himself." Manu declares (IX, 35) that the seed is more important than the soil, and the bestower of the seed marks the character of the offspring. The plant that grows on a field shows the features of the seed. Never therefore should a prudent, wise and learned man sow his seed in foreign soil; to do so will shorten his life and that of his line. Husband, wife and son should be one. In cattle it is not the owner of the male animal that gets the offspring. Men who procreate on the wives of other men benefit only the owners of the women. If no agreement has been made with the owner of the soil (*kṣetra*, *i.e.* the wife) the benefit (of procreation) goes to the owner of the soil, as the receptacle (*yoni*) is more important than the seed (*bija*). This is the law (*dharma*). Śaṅkhalikhita declare (p. 739) that if the sowing is done on a field without the knowledge of the owner of the field, the crop belongs to the owner of the field only, though there is difference of view about it. (p. 740).

#### *Extension of Sonship (Putrātideśaḥ)*

Among brothers born of the same father, if one has a son, all are declared 'be with son', through that son. Among co-wives, if one begets a son, all are said to have become mothers of a son (*putravatī*). It is on this ground that neither *niyoga* nor *adoption* is regarded as proper, *i.e.*, none can be adopted so long as a brother has a son to carry on the line. This applies only (according to Bṛhaspati) to full brothers (*sahodarāḥ*). If one full brother has a son, he can offer *pinḍa* to all the brothers of his father (p. 740).

#### *Etymology of the word Putra (Putraniruktādi)*

*Putra*, meaning son, is derived from *put* (Hell) and *trā* (to protect). The son saves the father and ancestors from falling into or sojourning in Hell, by performing the enjoined *śrāddha* and making offerings of funeral cakes (*pinḍa*). The family traditions for virtue, learning etc. must be continued through sons, grandsons etc. This is expressed rhetorically by Viṣṇu thus: "Through a son he conquers the worlds, through a grandson he obtains immortality, and through a son's grandson, he gains the world of the Sun." (p. 742) Vasiṣṭha declares "there is no place (in Heaven) for one destitute of sons." This is why Bṛhaspati advises a man, who has no offspring, to get a son *by any means* (*yādyā tādṛik prayatnataḥ*). Doing *śrāddha* at Gayā makes ancestors attain salvation. So they exclaim being afraid of sojourn in Hell—"May we have male descendants to enable us to get away from Hell."

### *The Despised Son (Ninditaḥ)*

The son born of mere adultery to one who *acts* like a harlot or *is* one professionally is the despised son (*ninditaḥ*).

Intercourse with a brother-in-law by a woman *when she already has a son* is not authorised, like *niyoga*; it is mere adultery. *Niyoga* in a form not authorized is similar, as the son of a woman who begets him in a manner not authorized is not entitled to the property of his mother's husband (Manu, p. 744). Gautama includes in this class the son begotten by a wife to a stranger, when for *niyoga* a brother of her husband is available. If a woman has committed adultery for money, the sons may offer *piṇḍa* to the procreator if they know his identity. Among sons of a woman who has remarried or taken a paramour after the death of her husband, each shall take of her property what may have come from his own procreator (*pitryam*). This rule of Manu is described as applicable to *aurasa*, and *paunarbhava* sons, by Kullūka, and to sons of harlots, remarried women and free-living women (*svairiṇī*) by Caṇḍeśvara (p. 745), following the *Pārijāta*. The property of the two partners of the woman is what has passed into her possession and is contended for by the sons.

### *Division of the Property of the Sonless Man*

If the widow of a man, who has died without leaving issue bears a son for him through *niyoga* with the younger brother or *sapiṇḍa* of the husband (*sagoṭra*) she must deliver to the son so raised the entire property of the dead husband, and not take any of it herself. A *chaste* sonless widow is alone to offer the *piṇḍa* (cake) to the dead husband. A widow desirous of *niyoga* relationship is not one who will be faithful to the bed of the dead husband. As Aparārka (p. 745) explains, such a widow will inherit her husband's property entirely (*samagram*), even if preference to the father and brother of the husband. The same rule is stated by Bṛhaspati (not cited by Lakṣmīdhara) thus: "in the absence of the son, the wife; in the absence of the wife, the own brother; failing him it goes to the inheritor (*dāyadaḥ*); and last of all it goes to the daughter's son (Jha, II. p. 449).

A special plea for the right of the wife is contained in a famous passage of Bṛhaspati, cited in full, on p. 746. "In the revealed Veda (*āmnāya*), in *smṛti*, and in popular usage the wife has been declared by wise men as half the body of the husband, and his co-partner in the fruits of merit and demerit (*puṇyā-punya*). Half the body survives, when the husband is no more and the wife is alive. How can any one take the property when half the body of the husband survives in her? Even if the kinsmen, father, mother and full brothers of a sonless man be alive, after his death, the wife must succeed to his share (*bhāgahāriṇī*). The wife who predeceases a husband takes away his consecrat-



ed Fire, (for *agnihotra*). The chaste wife must inherit his wealth. Such is the eternal law. After inheriting his movable and immovable property, his gold and base metals, his grain, his liquids and clothes, she shall have his monthly and annual *śrāddhas* done. She shall honour (*pūjayet*) her husband's paternal uncles, teachers, daughters' son and maternal uncles, as also venerable and help-less persons, guests (or blind persons) and women by funeral offerings and grain. If agnates or cognates inimical to her, injure her property, the king shall punish them as thieves."

If there is no son or wife, the daughter shall inherit the father's property, since son and daughter are both offspring and both extend the line (Nārada, p. 747). Manu asks how can any one else take the property when, in the absence of a son, there is the daughter, and she (like the son) is the father's (surviving) self? Whether she is appointed as a *putrikā* by her father or not, the daughter of the same *varṇa* as the father, married to one of the same *varṇa*, and who is gentle and devoted to her husband, shall inherit the father's property (Bṛhaspati, p. 747). The *putrikā* is 'appointed' on the understanding that her son will get her father's estate; if she is sonless, she must take her father's property herself (Medhātithi, IX, 130), even before her mother and in preference to her (*Smṛticandrikā*, p. 687).

If a man dies leaving neither wife nor son (or daughter v. l.) and the son is dead, if born, his mother gets his property, and by his (or her) permission his brother, after her (Bṛhaspati, p. 747). Jīmūtavāhana (*Dāyabhāga*, p. 186) explains that this rule should be construed as referring only to cases where the deceased has left no son, wife, daughter, daughter's son or father. Manu states the right of the mother to get the son's property by inserting the condition that the son must have died issueless (*anapatya*, p. 748). Caṇḍeśvara holds that the father's mother can succeed only in the absence of the father (p. 591).

If the father's mother is no more at the time, the father's father gets the property, or according to some the latter precedes his wife (i. e. the paternal grandmother) in inheriting. Mitramiśra declares that 'the point must remain undecided' (p. 632). Raghunandana (*Smṛtitatva*, II, p. 195) gives precedence to the paternal grandfather over the grandmother.

The decisions on the rights of brothers to succeed are stated in a manner that may cause confusion. Thus, Gautama (p. 748) states "among re-united coparceners, if one dies, his share goes to the eldest". Caṇḍeśvara explains this as referring to cases in which the wife, mother and father, who have claims of precedence to brothers in inheritance, are not alive at the time. Manu has ruled that in succession to a sonless man the mother and father of the person shall inherit, one in the absence of the other. (p. 748): and in another verse

he has stated that the father and brothers succeed to a sonless man's property (p. 748).

Lakṣmīdhara has quoted Paithīnasi (p. 748) for the dictum: "If a man dies sonless, his property goes to his brother; in the absence of the brother, his mother and father shall receive it, or his junior wife ('senior', according to another reading), then the *sagotra*, the pupil and fellow pupils." As this ruling has hiatuses that can be filled up by the clear statement of Viṣṇu (cited on p. 750), Lakṣmīdhara notes that, in accordance therewith, the wealth of a sonless man goes to the wife, even if there are brothers, if she is faithful to her husband etc., but if a wife (senior or junior) does not conduct herself in this virtuous way, the property will go to the brother, even if she is alive and available to take the heritage; and he adds the further explanation from Nārada that "the brothers of a dead man shall make provision for the widows of a dead brother, in case they are loyal to his bed (*i.e.* continue chaste) in the way of maintenance, and (discontinue it), if they are disloyal to the dead husband." In regard to the dictum of Yājñavalkya (II, 135), cited on the next page, laying down the order of a succession serially as wife, daughters, parents, brothers, their sons, *sagotras*, *bandhus*, disciple, and fellow students, each succeeding one getting the property in the absence of the preceding one, Lakṣmīdhara holds that the right to inherit given to the parents, when brothers are alive, is only as regards ancestral property (held by the dead man, and inherited from grandfather), and that in regard to property acquired by the dead man, by himself without prejudice to the property of the parents, the right to succeed to it vests only in the brothers. (See *Jha*, II, 458) "What Yājñavalkya has declared regarding the title of parents being superior to that of brothers refers to ancestral property alone," says Caṇḍeśvara, following, as usual, Lakṣmīdhara (*Vivādaratnākara*, p. 598). The citation from Devala (p. 748) that full brothers should divide among themselves the property of a sonless man, or equal daughters, or the father, if he be alive, half-brothers of the same caste, mother or wife *in due order* (*yathākramam*), is described by Caṇḍeśvara (*inf*, p. 749), as explained away by Lakṣmīdhara, by describing the dicta of Yājñavalkya and Viṣṇu (cited by him on p. 750) as *later* than Paithīnasi; and Devala's, and as over-ruling them. The citation of the views of Paithīnasi and Devala *before* those of Viṣṇu and Yājñavalkya can be construed as indicating the acceptance of the latter, by Lakṣmīdhara, as *final* (*siddhānta*). The ruling of Viṣṇu is: "The order of succession is this, in regard to a sonless man: wife, daughter, mother, father, brother, brother's son, *bandhus*, *sakulyas*, fellow-students, and the king, and if the property is a Brāhmaṇa's, what would go to the king should go to other Brāhmaṇas." The order of succession given by Yājñavalkya (II, 135-136) is as under: wife, daughters, parents, brothers, their sons, *sagotras*, *bandhus*, disciples, and fellow students. Bṛhaspati accepts this order: "after daughters and offspring of daughters the following shall succeed in

order: full brothers, their sons, *Sakulyas*, *bandhus*, disciples and learned Brāhmaṇas." The decision is apparently held to apply to Brāhmaṇas as the standard, as the king is omitted in the list.

In regard to what may be inherited by collaterals, it is directed (by Brhaspati) that half the *income* of the inherited estate should be set apart for the regular performance of the monthly, six-monthly and annual *śrāddhas* of the last owner.

*Sapiṇḍas* are defined by *Baudhāyana* (p. 751) as the great-grandfather, the grandfather, the father, oneself, full brother, son of a wife of equal *varṇa*, grandsons and great-grandsons. Among these a man, his son and son's son constitute sharers of oblations; the sharers of divided oblations are termed *sakulya*. On failure of all 'named' relations, the property of a deceased man goes first to his *sapiṇḍas*, and on their 'failure' to the *sakulyas*, and on their failure to his teacher, pupil, officiating priest and king respectively (p. 751). The king is enjoined to maintain Brāhmaṇa women (p. 751). 'Taking over (unrighteously) a Brāhmaṇa's wealth is taking poison' (*Baudhāyana*, 752), and the king should never take it. The king is similarly prohibited from taking over the property of gods (*i.e.* temples), *strīdhana* in its six varieties and the property of boys (*bālānām dhanam*, p. 752).

The king is enjoined by *smṛtis* to look after the properties of minors, during their minority or scholastic life (either directly or through relations) and (*Manu*, VIII, 27) Viṣṇu (p. 753) asks kings to protect boys and women without protector (*anāthastri*). The king is also to look after the property of minors (*i.e.* boys under sixteen) and that of Vedic scholars and wives of soldiers (who are out of the country). The property of minors, with accruing profits, shall be kept carefully by the king till the owner attains the age of majority (*Baudhāyana*, p. 753). Property that has lost its owner goes to the king (*Śankhalikhita*). It is the duty of coparceners to look after the property of any one of them who has gone abroad (*proṣita*). When a man dies leaving sons under age (*bāla*), he and the property that is his should be guarded by his *bandhus*. *Medhātithi* states that it is the king who must select from *bandhus* the proper guardian for a minor, when they compete for guardianship (VIII, 27). He should administer a minor's estate as it were his own (*bāladhanam rājñā svadhanavat pālaniyam*). The king's responsibility extends to taking care of childless women, or women whose families have become extinct, *i.e.*, who have no relations to look after them and persons afflicted with grave disease. (*Manu*, VIII 28-29).

#### *Responsibility for Funeral Offerings*

Capacity to offer *piṇḍas* to dead relations and heirship go together. The

inheritor of a property has to do the *śrāddha* for the dead person and also offer *piṇḍa* to him, and ancestors upto three generations. The *sapiṇḍikarāṇa* ceremony should be done for brothers, brothers' sons by *sapiṇḍas*, and by pupils for dead *gurus* ( p. 754 ).

In the case of a *vānaprastha* ( forest-dweller or hermit ) the property should go to his *ācārya* ( teacher ), or his pupil may receive it. A teacher inherits the property of hermits, the renunciate (*yati*) and the perpetual acolyte (*brahmācārīn*); and so in sequence the good students (*sacchiṣya*), brothers in spiritual learning, associate and in religious pursuits (*dharmabhṛāta*). ( Yājñavalkya, II, 137, p. 754 ).

#### *Partition after Reunion ( Samśṛṣṭivibhāgaḥ )*

Reunited coparceners inherit to each other (*paraśpara bhagināu*). *Smṛticandrikā* explains that reunited full brothers are those primarily meant by this rule. In the absence of a reunited full brother to a dead ( reunited ) coparcener, the other non-uterine partners will inherit his share.

The general rule about shares in a redivision is stated by Manu ( IX, 210-212 ). When reunited partners divide again, there shall be 'equal' shares. The rule has to be understood as between brothers by same *varṇa* mothers; in case they are by mothers of different *varṇas*, like a Brāhmaṇī and Kṣatriyāṇī, the new shares will be like the old. The insistence on 'equality' in repartition means only that no preferential share shall go to the eldest, *i. e.* no *uddhāra*, in redivision. Aparārka considers that in redivision each coparcener should get a share proportionate to what he brought into the common stock ( Aparārka, p. 748 ). This will in effect mean unequal shares but the equality consists on insistence of none getting a special share in virtue of his being the eldest son. *Vyavahāramayūkha* states that some deny even this sharing of what he has brought into the common stock. If one of the reunited coparceners dies, or becomes a *sanyāsin*, or dies childless and a widower, the share, such as he would receive, will go to his full brothers in the redivision, and some share to a full sister, if there be one. ( Brhaspati, p. 755 ). If during union (*samsṛṣṭi*) a partner had brought into the common stock his gains of learning and of valour, he must get a double share in recognition of it. If a reunited member has no issue, his share goes, according to the *Dāyanirṇaya* ( 22.2.1 ), to the others. *Strīdhana* is excluded from the division according to Śaṅkha ( p. 756 ). In the redivision, the widows shall, if chaste, be maintained by the other sharers all their lives. An unmarried daughter shall get her father's share for maintenance, and after marriage her maintenance will be the duty of her husband only ( p. 756 ). A *samsṛṣṭin* is one, who having become separated, comes of his own accord to live with his father or brother. If, when so living together, the father begets another

son, that son should get a share (Viśvarūpa, *inf.* p. 756), and if the new son dies, his share should go to a full brother. If a posthumous son is born to the reunited brother, that son should get from the latter his father's shares (Aparārka, p. 757). A non-uterine brother will not get the share of a non-full brother, even after union, and a full brother will get the share of a full brother, even though not united. This is an exception to the rule that when a man dies without a son, his property goes to his wife. The present rule states an exception to it, when the death occurs after union. The shares of reunited coparceners must go to the coparceners that survive; and the shares of those who are living apart to the others living similarly. This will be so only in the absence of wives and other heirs, who are entitled to receive the property (p. 757).

#### *Establishment of Fact of Partition (Vibhāgaśāstra)*

When the legality (dharma) or the fact of a partition is questioned, the decision must be reached from the testimony of kinsmen, the deed of partition and the transaction of business separately. Thus, among undivided brothers religious duties are common, and after division they must be done by each separately. Giving and receiving cattle, food, houses, lands and servants, acquisition of wealth and expenditure are all separate for separated brothers. The acts of standing surety, making and accepting gifts and giving evidence may be noted, from facts, as evidence of partition, even apart from a document (Nārada, p. 758). The acts of giving evidence, of becoming a surety, of giving and acceptance may be done between one another among brothers, who have made a partition, and not by undivided ones (Aparārka). Yājñavalkya has described thus the means of establishing a partition that has been denied: "Among undivided persons, like brothers or married partners, or father and son no suretyship, or loan transaction or bearing witness is permitted. Those", says Brhaspati (p. 759) 'who keep their income and expenditure separate, as well as their wealth, and engage in mutual lending and borrowing and trade with each other are without doubt divided.'

#### *What Divided Partners can do (Vibhaktakṛtyam)*

The position is stated thus by Nārada: If there are several descendants of a man who do their religious acts separately, transact business separately, and the implements of work, and who are not doing business jointly, in case they desire to give away or sell their own shares they are free to do so, as they are masters of their own wealth." (Nārada, pp. 759-760). The separate religious duties are like 'the five great sacrifices.' The restrictions of the freedom of even a divided member are stated under 'resumption of gifts etc.' In *pitṛka-pūjā* and *śrāddha* separately, as in *pitarah* as in

A person who of his own accord has secured a partition and then resiles from it must be confined to his own share by the king and if he breaks the command he must be punished. Divided or undivided, all are equal in regard to immovable property, as coparceners, and none of them has the right to give away, sell or mortgage any part of it of his own accord.

In regard to the production of the deed of partition as proof of its having been made, Brhaspati has described the deed of partition as that drawn up by coparceners by mutual assent. It is termed *vibhāgapatram*.

Kātyāyana (893) holds that if a number of brothers have lived separate for ten years, they must be regarded as *separated*. He prescribes the *kośa* ordeal to establish the fact of partition, if it is denied (415).

#### *Gambling and betting. (Dyūta-samāhvaya)*

According to Nārada, *dyūta* is artful playing with dice etc., while *betting* (*saṃāhvaya*) consists in sporting with birds and other animals. What is done through inanimate things is gambling and with animate betting. Ivory strips, lead, dice, *kuhaka*, seeds are the instruments of gambling. In betting rams, bulls or other animals like cocks are made to fight and wagers are laid on the results of the fight. Prize fighting and wrestling are also included under *samāhvaya*. Both and especially gambling, have been regarded as reprehensible practices, and people who become addicted to them will not easily give up the practices.

Manu's attitude to gambling is hostile. He describes it as 'open theft,' which, by its spread, causes the ruin of kingdoms and of princes who become gambling addicts. He recommends a king to put down both. 'A wise man should not gamble even in amusement.' (*dyūtam na seveta hāsyārtham api*). Commentators have explained the prohibition as in regard, only, to unlicensed, unsupervised and unauthorised gambling. It was widely recognized that gambling inflames passions, engenders quarrels and cruelty and leads to waste. (Kātyāyana). If a king cannot put it down, he should at least allow it only under supervision and control, openly and in supervised halls, which are easily recognizable by festoons and arches on the doorways, in order that they may be recognized as what they are and avoided by respectable persons. A reason for allowing supervised gambling is to help in crime detection. The king is therefore asked to appoint a superintendent of gambling. This officer must watch the gambling and collect the amounts due to the state as well as to winners. He is to collect ten per cent of the winnings from the loser, who thus loses more than the amount staked. The winner should be paid within three weeks the amount won. Yājñavalkya (p. 764) will give the superintendent five per cent of the winnings also from the winner. A gambler who fails to pay what he has lost is

barred from entering the gambling saloon again [p. 766]. The winner is free also to collect the winnings in any manner he chooses (Nārada, p. 766). This indicates a difference in practice in supervised gambling. One who gambles in unlicensed places or ways is to be fined.

It is natural that the superintendent of gambling should be offered small gifts by the gamblers, and he is permitted to accept such gifts, though the permission is coupled with disapproval. One who uses false dice is to be banished (p. 768), or be subject to mutilation. In disputes between gamblers the superintendent is the final authority.

### *Relative Validity of Transactions (Kriyābhedaḥ)*

Before proceeding to treat of miscellaneous topics, Lakṣmīdhara has a small section on the relative validity of transactions (*kriyābhedaḥ*), pp. 771-772. A prior transaction must be upheld as against a later; if not, it becomes an alteration of the transaction. The revocation of an agreement and the making of another is an alteration of transaction. An earlier transaction is made void by a later; a subsequent agreement overrides a prior (p. 771, Bṛhaspati). In all civil disputes, (*vivādeṣu*), the later prevails, but in sales, gifts or pledges the prior predominates. In transactions relating to debt, the last is decisive. In sales, gifts mortgages, pledges and acquisitions the earlier prevail. When a person makes a deposit and later on converts it into a pledge, after receiving money for it, or sells it, the later act prevails over the earlier.

### *Prakīrṇakam (Miscellaneous Topics)*

In works on *Vyavahāra* the last title or section is termed *prakīrṇakam* (miscellaneous matters). Topics not dealt with in the earlier sections are brought into this section, so that the book may be complete. Whether the section is large or small depends on the treatment of other topics in the earlier sections. *Nārada-smṛti* has a section on *prakīrṇakam*, which its translator ('J. Jolly, S.B.E., XXXIII pp. 214 ff.) describes as meagre and not in keeping with the announcement made in the first four ślokas. "Under the head of *prakīrṇakam*," declares Nārada, "are comprised law suits depending on the king such as transgressions of the king's commands, and obedience to his injunctions: Grants of towns, the division of the constituent elements of the State, the duties (and the reverse) of heretics (*pāśāṇḍi*), followers of the Veda (*i.e.* orthodox men), corporations of merchants and groups of kinsmen (*śreṇi-gaṇa*), disputes between father and son, neglect of obligatory penances, seizure of the gifts made to worthy persons, causing loss (*or* wrath, if the reading *kopa* for *lopa* is adopted) to anchorites, sins springing from mixtures of varṇas (by improper unions), rules about the means of living for mixed castes,—and in short, whatever has been omitted in the preceding titles of law are treated under the

head of *Prakīrṇakam* (miscellaneous)." (p. 773). Kātyāyana declares that in the section on *prakīrṇakam* are treated whatever has been omitted by him in previous sections and whatever is cut off from its context, and what is taken from other sciences (*paratantra*) and omitted before from its not suiting the context (944-946). Bṛhaspati (p. 775) states in his section on the topic that *ten* offences must be personally enquired into by the King and dealt with by him personally. Among them are the killing of cows and Brāhmaṇas, destruction of crops, adultery with another's wife (*paradārābhimarśaṇam*) and tax evasion and non-payment when due (p. 775). The King has also to investigate through secret agents (*cārā*) failure by persons to carry out enjoined expiations (*niṣkṛtlināmakaraṇam*), transgression of a royal warrant of arrest (*ājñāsedhayatīkrama*), transgression by subjects of the rules of *varṇa* and *āśrama* and failure to perform duties enjoined as such, accumulation of hoarded wealth (*nidhi*) by failure to use wealth properly, and sudden accession of wealth to paupers (p. 775). He should also take steps to prevent such irregularities or offences. He should take also effective steps to prevent the doing of acts prohibited by the *śāstras*. He should see to the proper disposal of suits instituted by complainants (*vādinām kriyāvādāḥ*). He must discover secret associations of subjects against the State, and see to the prevention of the spread of every practice or custom or act contrary to *śāstras*. All the four appointed means (*śama*, *bheda*, *dāna* and *daṇḍa*) should be used by him to overcome evil and evildoers in the kingdom (p. 775).

#### *Maintenance of the Varṇāśrama system.*

The rules of the system have been elaborately described by Lakṣmīdhara in earlier *kāṇḍas* of the *Kṛtyakalpataru*. He now cites Yājñavalkya (I, 361) for the injunction to the king to discipline and put again on the right track all those who transgress (in his kingdom) the rules binding on families, castes or groups and stray from them. All the four means (*caturupāyāḥ*) are to be employed to overcome opposition and bring back to their appointed mode of life or conduct men of all *varṇas* and all stages of life (*āśramāḥ*).

If members of a *varṇa* go beyond bounds or fail to discharge appointed duties of the *varṇa*, they should be brought back to the right path (p. 775, Nārada). The State has its root in the King, obedient to the injunctions of Dharma, with Brāhmaṇas and Kṣatriyas as leaders of society (*Śaṅkhalikhita*, p. 776). Manu has ruled that the king should see to it that Vaiśyas and Śūdras discharge their appointed functions and thereby prevent the disintegration of society (p. 776). By his own loyalty to *śāstraic* rules and by his personal example the king should set an example to his subjects 'The world', says Gautama, 'is upheld by the king and the Brāhmaṇa (p. 777)'. Accordingly both the king and the Brāhmaṇas should inculcate, and impress on the other *varṇas*, their ap-



pointed duties and functions, and the king should see that they are duly followed (Vasistha, p. 777). "By kindness, discipline and protection the king becomes the guide, controller and judge of all who transgress bounds. "The Teacher (*guru*) controls and guides the pupil, the King the law breaker, and the god Yama, son of Vivasvat, the judge and punisher of all who sin secretly or openly, in mind or in body. Those who escape the control and punishment at the hands of teachers or kings, cannot escape punishment by Yama and of being thrown into hell (Hārta, p. 777). The teacher (*guru*) prescribes appropriate expiatory rites to those who transgress religious duties or perform religious rites improperly or not at all. If the directions of the teacher (*guru*) are ignored or transgressed, the king must step in to see they are carried out and the defaulter punished. If the king himself transgresses rules of śāstra he must go to his *purohita*, who is a master of Dharma, and follow his directions for expiation (Āpastamba, p. 777).

### Rules of Punishment

The punishments that may be imposed for violations of laws, state or spiritual, may extend to death (p. 778). They must be according to the gravity of the offence, and the age, education, caste (*varna*) and apparent qualities (*lakṣaṇagūṇanigāh*, Sankha p. 778). The nature of the offence, the place of its occurrence, the time of its commission, the strength, age, profession and means of the offender should be considered in deciding on an appropriate punishment (Yājñavalkya, I. 368, p. 779). Viṣṇu (p. 779) advises the amount of damage done by an offender to be considered also in selecting his penalty (p. 779). If an offender has been let off for a first offence, he should not be allowed to escape punishment if he offends again; nor can the king pardon one who violates his duty (*svadharmaṃ apālāyaṇaṃ ādādyo rājñah*, Viṣṇu, p. 779). In the case of an offender who admits that he uttered objectionable words in ignorance or carelessness or from rivalry or familiarity in—cases of abuse—the admission, coupled with a pledge not to offend so again—will justify half the usual penalty. (Uśanas, p. 778), viz., a fine. No one is totally exempt from punishment for an offence committed by him, be he a father, a teacher, a friend, the mother or the wife or the domestic priest (Manu, VIII, 335). The king should restrain his anger when he has to deal with children, women, the aged and ascetics (p. 780). Reprimand, fines and corporal punishment are grades of penalties to be imposed according to the gravity of offences (Bṛhaspati, p. 781). Admonition, with the word "fie" (*dhik*), is for light offences, reproof for *pūrvasāhasa*, fine for middle *sāhasa*, imprisonment in a police lock-up (*rodhanam*) and in gaol (*bandhanam*) for offences against the king. Admonition and reproof may be ordered by the judge, but the king alone (or the judge with subsequent royal sanction) can impose fines and corporal punishment (Bṛhaspati, p. 781). A criminal may

be put in fetters or imprisoned. Publicity to the punishment of crime is advised so as to react on the public mind. Corporal punishment, according to Manu, can be inflicted only on *ten* named parts of the body, according to Manu, and on *fourteen*, according to Bṛhaspati (p. 782). Yama will exempt Brāhmaṇas from corporal punishment and the death penalty (p. 783). Hārta forbids mutilation in the case of Brāhmaṇas (p. 783). The older smṛtis make the exemption of the 'Brāhmaṇa' wider; thus, Gautama (p. 783) prohibits the infliction on Brāhmaṇas of the following penalties: corporal punishment, imprisonment, fine, exile, reviling and exclusion. Saṅkhalikhita will not allow a Brāhmaṇa offender to be tormented (not as torture, which is not allowed at all, but as a punishment), p. 784. Manu will allow him only to be sent out of society, and allows the branding of marks of infamy of his crime on a Brāhmaṇa's forehead for the most heinous offences (VIII, 381). Public disgrace as getting the head shaved, thereby removing the tuft, which is necessary for religious sanctity, public exposure and expulsion from society are alone allowed in his case.

An offence is both a crime and a sin. For both there are expiations: punishment for the first and 'religious expiation' (*prāyaścitta*), which involves guidance and co-operation from Brāhmaṇa. The Brāhmaṇa, who is driven out of society, for a grave crime is denied expiation, and being out of society, he cannot even get his food and shelter, and must be driven to death. To those who believe in rebirth, after this life, and according to the good or bad deeds done in this life, rebirth in various forms, according to the expiated or unexpiated crimes, is inevitable. These forms of rebirth in relation to offences are described by Manu and Yājñavalkya. Those guilty of the 'five great sins' (*pañcamahā-pātakāḥ*) are also prescribed expiations. Thus for stealing a Brāhmaṇa's gold, which is one of the five cardinal sins, the offender is advised to go to the king with a club in his hand and ask the king to strike him dead with the club (Manu, XI, 102), or, he has to do austerities in the forest for a whole year, as an expiation. He who commits adultery with his teacher's wife should, after confessing his offence (crime as well as sin) extend himself on an iron bed, made red-hot, or embrace a red-hot image of a woman and die; by death thus he is freed from the sin (Manu, XI, 104). Marking offenders with indelible signs indicative of their crimes, in the five great offences, is both for giving publicity, thereby excluding the offender from all possible association with good persons, who can help him in expiatory rites, and for driving him out of family and society, receiving no compassion (*nirdayā*) and dying. But if penances are done, after a crime, and if appropriate fines are paid, the offender need not be marked indelibly with appropriate figures indicative of his crimes. (Manu, p. 785). Simple banishment with its effects are indicated to the Brāhmaṇa for some offences, while for similar offences the non-Brāhmaṇa will have his property confiscated and then banished. None should speak to one who has slain a

Brāhmaṇa ( p. 786 ). Āpastamba ( p. 786 ) allowed certain holy persons ( *ācārya*, *ṛtvik*, or *snātaka* ) to intercede to secure a remission of sentence. To prevent kings making money out of fines for crimes, the king is asked to throw fines or wealth obtained as punishment for great sins to throw it into water, as an offering to Varuṇa ( ' the lord of punishment, even over kings ' ) or distribute it among learned Brāhmaṇas. Yama does not allow total confiscation of an offender's property and rules that a fourth of it must be left for the offender's descendants and dependants ( p. 787 ).

#### *Exposition of the principles of Punishment*

A review of the principles underlying penal law is resumed by Lakṣmīdhara, after two sections dealing with tolls and ferry dues ( *taraśulka* ) and treasure trove ( *nidhi* ). It is natural that some attention to penalties should be brought in when dealing with the king's duty to maintain the system of castes and stages of life ( *varṇāśramadharmā* ).

Danḍa is punishment, and the regulation of punishment is *danḍapranayana* is regulation ( by rule ) of punishment. Law and social order can be maintained only when those who go against both are brought to book. The aim of *danḍa* ( punishment ) is fourfold : prevention, deterrence, reformation and retribution. These are all implicit in the treatment of criminal law in Dharmaśāstra. A gradual change may be noticed in smṛtis from severely retributive types of punishment to preventive and reformatory types. It obviously reflects the growth of settled social order. Penalties, which aim at publicity and ridicule of the criminal, like parading a criminal on the back of a donkey, with marks of his crime indelibly marked on his face, are obviously deterrent. In ordered society he who is hurt is not allowed to take the law into his own hands and attack the hurter, but the state takes up the matter either *suo moto* or on a complaint by either the police or the injured person. Smṛtis assume the deterioration in human nature with advance of *Kaliyuga*, and therefore make it the king's ( *i. e.* the state's ) duty discover perpetrators of crimes ( by secret agents or the police ) and punish them, in the interests of social order and security. The idea is expressed picturesquely. Punishment ( *Danḍa* ) is divinity, and the son self-born ( *ālmaja* ) of the Creator, filled with radiance and power. The King is identified with Danḍa ( *sa rājā puruṣo danḍaḥ* ). The figurative idea is developed. Danḍa watches over people, awake or asleep. Persons swerve not from their duties by fear of Danḍa. Danḍa is the means of social security, the upkeep of the regulations of *varṇa* and *āśrama*. The wise identify Danḍa and Dharma and regard them as identical ( Manu, p. 794 ). A king must possess insight, knowledge, diligence and a sense of justice in order that he may administer Danḍa. He must have assistants to prevent offences, discover offenders and bring them for justice. The smṛtis exhort the king to rise to the height of his

moral stature in order that he may justify his claim to be 'an incarnation of Daṇḍa,' i. e. righteous punishment. A king who swerves from Dharma is struck down by Daṇḍa. Punishment, when inflicted justly, contributes to social security and happiness, but is destructive, when inflicted without judgment (p. 795). Failure to prevent or punish crime results in anarchy. A just king is in wisdom an incarnate 'preceptor of the gods' (Bṛhaspati), and in relentless impartiality in punishing a veritable god of death (Yama), says Angiras (p. 795). The administration of criminal law justly and wisely is like the performance by the king of numerous Vedic sacrifices (*yāga*), in spiritual result (Yājñavalkya, I, 359). Just punishment enhances a king's fame, and unjust destroys it. Neglect to exercise the power and duty ruins a king and the kingdom. If a criminal who must have been punished is allowed to escape, the king, as an expiation for his dereliction, must fast for a whole day, and his preceptor (who has to guide him) for three days (*Vasiṣṭha*, p. 796). Punishments must be graded. They must suit the offences as well as the conditions in which they were committed, such as being a first offence of the offender, or unintended. The punishments also should be graduated.

In a previous section Lakṣmīdhara mentioned the punishments prescribed for six categories of crimes, named by Nārada, viz. homicide, theft, violation of the chastity of the wives of other men and the two kinds of violence (*sāhasa*). It has already been noted that the administration of criminal justice is by the king on his own initiative, and not (necessarily) private complaints lodged in courts. Punishments are laid down for civil offences but they do not come within criminal law, but the standards of fine is the same for both classes, and is given in *Prakīṛṇakam*.

#### *Gradations of Fines*

Fines are classed as three, the lowest called the first (*prathama*), the middle (*madhyama*) and the highest (*ultima*). The amounts indicating the limits in the three classes are given differently by different authorities. According to Śaṅkhalikhita the first ranges from 24 to 91 paṇas, the middle from 200 to 500, and the highest from 600 to 1000. Nārada gives them as not exceeding 24 paṇas, 200 paṇas and 1000 paṇas, the minimum for the highest being 500 (p. 806). Yājñavalkya gives highest 1080, as a maximum, half of it the middle, and half of the middle the lowest. Manu makes the three 250, 500 and 1000 respectively. The economic condition of the person fined has to be taken into consideration among the eleven points to be taken into account in deciding on punishments to be awarded. The other ten are the offender's *varṇa*, his age, past record, in the case of corporal punishment the place on which it is to be administered, the time of the offence and details of the offence to determine its exact nature. A first offender is to be treated more lightly than an old offender.

The punishment *rises* with the *varṇa* of the offender. The punishment for a Vaiśya, a Kṣatriya and a Brāhmaṇa are to be respectively twice, four times and eight times that for a Śūdra. It seems hard on the two highest *varṇas* as they were poorer than the Vaiśya. The implication is apparently that the Brāhmaṇa and the Kṣatriya should set up a higher standard of conduct than the other two *varṇas*, and it is enforced by the higher punishments to them if they offend. On the other hand there is the rule that in deciding on a penalty for an offender his economic condition should be taken into consideration. A Brāhmaṇa who is unable to pay his fine is expected to make up by labour, and if his fine is so high it will virtually mean serf labour for him. The old rule of Gāutama (*infra* p. 783) that the Brāhmaṇa should, among other exemptions, be exempt from fines seems to have changed later.

It may be presumed that the rates prescribed for the three classes of fines are immutable, and where the maxima and the minima are specified, there would presumably be discretion left to the judge to inflict a fine within the prescribed limits, after considering all circumstances. A solitary offender is to be punished according to the rules, but gangs of criminals will be punished by each member of the gang getting enhanced punishment, usually twice that for an individual criminal. Fines are not to be imposed on slaves, as they have no property.

Children, very aged folk, persons suffering from grave disease and women are usually exempt from the general rule of punishment, but a rich woman can be fined; and according to Kātyāyana (p. 803), a married woman can be made to pay a fine out of her *stridhana*, while man can be beaten.

#### *Immunities.*

Nārada (p. 803) names the following as allowed to Brāhmaṇas without any liability to penalty: free access to the houses of others for collecting alms (*bhāikṣyaśeṭoḥ*); freedom to collect fuel sticks for the sacred fire (*samit*); from other persons' property without its being deemed theft, as also flowers, *kuśa* grass, water and the like needed for worship (*pūjā*); freedom to talk to women of other families without objection (*anākṣepa*); crossing ferries without having to pay tolls or ferry charges; precedence in being ferried over rivers; exemption from ferry dues for merchandize or goods carried by them. Śaṅkhalikhita (p. 804) add to the list these: collecting leaves for *pūjā* or religious rites, free access to holy places and shrines, (*daiva-tīrthābhigamanam*), carrying on roads weapons for self-defence, unrestricted right to seats, non-obstruction to continue what has been begun (*prastuteṣu anivāraṇam*), remaining in bad company suspicion free, gleanning grain from fields bordering roads, taking a seat before the king without being punished for discourtesy.

Except when they act against the king's interests, members of corpora-

tions or business men are free to act. A man's means of making a living, like the tools of a craftsman, the musical instruments and wardrobe of actors, ornaments, coats and clothes of 'public women' and weapons of soldiers cannot be taken away as punishment (p. 800). The intention is clear: impoverished persons are compelled to commit crimes for a livelihood and the State should not leave them penniless and bereft of making a livelihood by depriving them of their working equipment (Śaṅkhalikhita, p. 800).

This may be compared with section 60 of the Indian Code of Criminal Procedure.

### *Mitigation of Punishment*

Self-defence is an effective answer to a charge of violence and even homicide. The rule against the slaying of a Brāhmaṇa is modified by making it justifiable for any one to kill a Brāhmaṇa, who has come manifestly with murderous intent, thus acting in self-defence. To reconcile this plea of self-defence with the laying of a Brāhmaṇa assailant, smṛtis have been at pains, as pointed-out in my article on *Ātatāyivādha*, to advise the attacked person to run away, and escape being killed. As already pointed out a Brāhmaṇa unable to pay fines, may commute it by his labour. Accident and hurting a person unintentionally or from sheer helplessness are to be considered in dealing with charges against a person, along with his past record (p. 797).

### *Partial or Total Mitigation of Punishment*

A penalty imposed may be partially or wholly mitigated in some cases. Even one deserving a capital sentence may be let off on his paying a fine of a hundred gold coins, and one sentenced to mutilation for half this amount, and he who has been sentenced to lose his fingers for a quarter of the amount (Bṛhaspati, p. 801). Banishment, after forfeiture of all their property, may be accepted in lieu of a sentence, in the case of men of good families. A Brāhmaṇa guilty of a capital offence may be deterred from similar acts by imprisonment (p. 801). Banishment is the penalty for a Brāhmaṇa who is a perjurer or accepts wrong gifts (p. 802). Bhṛgu would impose the middle amercement in lieu of mutilation in cases in which the latter is the penalty prescribed.

### *Tolls and Ferry Dues (Taraśulka)*

Manu (VIII, 404-405) indicates the standard rates of tolls payable (including ferry charges) at ferry stations, thus: a cart must pay a *paṇa*, a man with a load half-a-*paṇa*, an animal or a woman a quarter of a *paṇa*, a man without a load one-eighth of a *paṇa*. Carts with loads should pay *ad valorem*; men without loads and empties only a trifle.

Boat hire on rivers must be suited to distance and the time taken in transit

but for ships that ply on the sea standard rates for carrying men and goods are prescribed. A pregnant woman, an ascetic, a *vānaprastha* and students of the Vedas who are also Brāhmaṇas are free from ferry tolls. Medhātithi interprets this rule as making heterodox monks, *e. g.*, Buddhist or Jaina, liable to pay tolls. He who tries to evade a toll by swimming across the river is to pay a hundred times the toll. The following are free from taxes, and therefore of tolls: the King, a diseased and proctorless person, a young woman recently confined and her child, widows returning to their families after being widowed, virgins and messengers on errands of urgency (Vasistha, p. 790). A ferry or toll collector, who misappropriates the amounts collected, will be punished, as well as he who collects tolls or dues from persons who are exempt. In the last case, the amounts collected must be refunded. Damage done to goods in transit by the negligence of the boatman, or lost, must be made good by him, but the rule does not apply to cases of loss due to accident (Manu, VIII, 408).

#### *Treasure Trove (Nidhi)*

He who discovers buried treasure and establishes his right to it will be allowed to keep it, after paying the king from one-twelfth to one-sixth its value. He who makes a false claim to it will be fined one-eighth of its value. In regard to treasure found to be his, a Brāhmaṇa is free from paying the percentage due to the king in such cases. The discovery of treasure trove should be reported to the king. If it is proved to be his, he retains it or gets it back from the king, and not, if it is otherwise. Ownerless treasure goes to the king and the discoverer is paid one-sixth its value, but a Brāhmaṇa owing to his lawful duties is exempt from such a payment. Nārada holds the king to be the owner of all treasure trove (p. 792) and so notice of the discovery by the finder is obligatory, as otherwise the discoverer will be deemed a thief (and dealt with as such). Yājñavalkya while allowing a Brāhmaṇa who discovers buried treasure to keep it, allows Kṣatriya and Vaiśya finder to retain only half the treasure, the other half going to the king. If a king discovers buried treasure, he should give half of it to Brāhmaṇas, and retain the other half. A Vaiśya discoverer should give a fourth to the king, one half to Brāhmaṇas and retain a fourth. A Śūdra finder may retain one-sixth the found treasure, after giving the king and Brāhmaṇas five-twelfths each (Viṣṇu, p. 792). The king gets one-half of all ancient hoards, that are found.

#### *Mines*

Everything dug up from mines belongs to the king, and thus the state has a monopoly in mines. Kauṭilya asks the king to appoint a superintendent of mines. Manu will give the king one-half of all that a mine yields in metallic ore (VIII, 39, p. 793).

### Group Names

In explanation of group names, Lakṣmīdhara (pp. 678-682) makes a citation from Kātyāyana (678-682): *Naigama* means a group of inhabitants of the same city. *Vrāta* means a troop of persons carrying weapons. *Pūga* means a group of merchants and the like. *Gaṇa* means a group of Brāhmaṇas. *Pāṣaṇḍāḥ* are ascetics who have forsaken their ascetic life. *Śilpinaḥ* means craftsmen. *Saṅgha* is the designation of a group of *ārhata*s (i. e. Buddhists). They are also named *Saugatāḥ*. *Gulma* is the name for a group of *caṇḍālas* and *śvapacāḥ* (cookers of dog meat). Bṛhaspati uses the term *vrata* to describe groups of all kinds. Persons born of unequal *varṇas* are termed *a-sajātīyāḥ*.

### Standards of Measure and Money (*Mānasmjñā*)

Fines are stated in terms of various coins or measures. To elucidate them, Lakṣmīdhara has a small section (pp. 807-809). He cites Manu (VIII, 131-137), Yājñavalkya (I, 364), Viṣṇu (IV, 8-9), Bṛhaspati, Nārada and Kātyāyana. Vardhamāna's *Daṇḍaviveka* has summarised the available data (pp. vii-viii) more lucidly. Coins are of copper, silver or gold. The *paṇa* is a copper coin. *Māṣaka* is a silver coin. The *dīnāra* is a silver coin. *Niṣka* is a gold coin. Whenever a number is mentioned in regard to a fine, without description, it must be construed as of *paṇas*. Thus, to say "he should be fined a hundred" is "he should be fined a hundred *paṇas*. A *kārṣāpaṇa* equals sixteen *paṇas*. One-fourth a *paṇa* is a *kākinī*. A *dhānika* is equal to four *kārṣāpaṇas* or sixty-four *paṇas*.

When *māṣa* is stated as a coin, it means gold *māṣa*. A *māṣaka* is a silver coin. Coins are ingots of metal, going by weight.

A *gunjā* berry is equal in weight to two barley corns (*yava*) or twelve mustard seeds (*sarṣapa*). *Kṛṣṇala* is a black berry used as a weight, and weighs three *gunjā* berries (*raktika*). Sixteen *māṣas* of golds make a *suvarṇa*. In gold coins, sixteen *māṣas* or eighty *kṛṣṇalas* make a *suvarṇa*. Four *suvarṇas* make a gold *niṣka* or a *pala* of gold, and ten *palas* one *dharaṇa* of gold.

In silver, two *kṛṣṇalas* make one *māṣaka*, and sixteen silver *māṣakas* (or thirty-two silver *kṛṣṇalas*), make one *dharaṇa* of silver, also named *purāṇa*. Ten *dharaṇas* of silver make a *śatamāna* or 320 *kṛṣṇalas*.

Nārada states that a silver *kārṣāpaṇa* is known in the South as a *raupya*.

Kātyāyana states that when a fine is mentioned in *māṣas*, silver *māṣas* are meant (p. 809), and so also if expressed as *kṛṣṇalas*.

Yājñavalkya (p. 808) states that a *pala* is equal to four or five *suvarṇas*.

Kātyāyana (p. 809) states that where a fine of fraction of a *māṣa* is prescribed, it should be taken as one *māṣa*.



### Mixture of *Varṇas*

Manu has stated the position of the Brāhmaṇa as the first among the four *varṇas*, owing to his superiority of origin, his careful observance of rules of life (*niyamasya dhāraṇāt*) and the merit conferred by the *samskāras* he has undergone. The twice-born (*dvija*) are the Brāhmaṇa, the Kṣatriya and the Vaiśya as they are reborn by *samskāra*. The Śūdra forms the fourth *varṇa* and is so by birth alone, *i. e.* not raised by *samskāras* (p. 811), like *upanayana i. e.* initiation into Vedic study. *There is no fifth caste.* That is to say that last *varṇa* is residuary, and all who do not belong to the three other *varṇas* come under the fourth. Descent in normal and abnormal sex-unions, *anuloma* and *pratiloma* result in mixtures. The mixture of *varṇas* by sex-union creates new groups, and as *samskāras* are denied to many of them, these will have only the status of the Śūdra. Where the husband is of a higher *varṇa* than the wife, the children belong to the *anuloma* class; where the wife is of higher *varṇa* than her consort, the offspring will constitute the *pratiloma* class.

If the male in the union is a Brāhmaṇa three *anuloma* groups are possible, when the woman is one of the remaining three *varṇas*. Similarly, there will be two *anuloma* groups where the father is a Kṣatriya and the female partner a Vaiśya or Śūdra, and a Vaiśya husband of a Śūdra woman will create one *anuloma* group only. In all therefore there can be only *six anuloma* groups. As the unions are abnormal, Manu styles them as *apasada* or baseborn (X, 10). Children of a male of a higher *varṇa* and of a female of the next *varṇa* (in the traditional order) are called *anantara* (X, 14) "on account of the blemish (*i. e.* inferior status) of the mothers." The son of a father *two varṇas* above the mother is termed *ekāntara*, and the son of a father two steps higher than the mother is termed *dvyantara* (Nārada, p. 815). The terms are descriptive of the intervention of one, or two steps between father and mother, and are applied also to *pratiloma* (or "reverse" unions.) The son of a Brāhmaṇa woman by a Kṣatriya father is also termed *anantara*. The son of a Kṣatriya woman to a Śūdra is termed *dvyantara*, in the reverse order (Nārada, p. 816).

*Pratiloma* born persons are described by Viṣṇu as "despised by Āryas" (*ārya-vigarhitāḥ*), p. 817. The lowness or despicability is proportioned to the difference in step between the parents, being lower where the intervening group is one or two. *Pratiloma* births are described as due to infatuation (*moha*), by Paiṭhīnisi (p. 818). Baudhāyana (p. 819) holds that those born from an intermixture of *varṇas* are *vrātyāḥ*, *i. e.* equal to outcasts. Manu declares (p. 824) that sons whom twice-born (*dvija*) men beget on wives of equal *varṇa*, *i. e.* their own *varṇa*, but who, by failing to discharge their sacred duties (*avratāḥ*), lose the right of initiation into *sāvitrī* (*i. e.* are not invested with the sacred thread in *upanayana*) are declared to be *vrātyāḥ*. Omission to discharge appointed duties

of *dvijāḥ* may be voluntary, and he who does so becomes a *vrātya*. Their children by women of their own natal *varṇa* will also be *vrātyaḥ* (Devala, p. 827) and must be excommunicated (*bahiṣkṛta*). This may be taken as an emphatic way of stating the obligatory nature of the religious duties imposed by their birth on the three higher *varṇas*.

In a famous passage Manu (p. 828) declares that through their omission to do enjoined religious acts (*kriyāloṇāt*) the following Kṣatriya born groups (*Kṣatriyajātayaḥ*) have sunk to the level (or status) of Śūdras: the Pauṇḍrakas, Coḍas, Dravidas (v. l. *Coḷa-Drāvidaḥ*), Kāmbojas, Yavanas, Śākas, Pāradas, Pahlavas, Chīnas, Kirātas, Dāradas and Khasās. An Āryan's birth is revealed, says Manu by his actions, more than even by his appearance. Behaviour unworthy of Āryans, e. g. harshness, cruelty, and habitual neglect of prescribed duties (*niṣkriyātmata*) reveal the real race of a person (p. 828) and his impure birth. Again, he says, that though twice-born persons may beget sons of equal *varṇa*, such sons, if they neglect their obligatory duties, are excluded from Sāvitrī and must be deemed Vrātyas. From such a '*vrātya*' sprung of Brāhmaṇa parents have come the Bhṛjjakantakas, the Āvantyas, Vāṭadhānas, Puṣpadhas, and Śaikhas (v. l. Śaiśava). From a Kṣatriya *vrātya* have sprung the Jhallas, the Mallas, the Licchavis, Naṭas, Khasas (v. l. Veśas) and Drāvidas. From a Vaiśya *vrātya* have sprung Sudhanvācāryas, Kāruṣas, Vijanamās, Maitras, and Sātvas.

Sons born of parents of the same *varṇa* are *savarnāḥ*. The term cannot be applied to persons born as mixed castes. The son of a father of a higher *varṇa* and a woman of the next lower one is classed by Uśanas (p. 814) along with the father. "The person born through a Brāhmaṇa father from a Kṣatriya mother is also a Brāhmaṇa." This dictum is interpreted by Lakṣmīdhara as meaning that he is higher (*utkrṣṭa*) than a Kṣatriya but lower than a Brāhmaṇa (p. 814). Baudhāyana also declares that a son born of a Vaiśya woman to a Kṣatriya is a Kṣatriya. The view of Uśanas and Baudhāyana is opposed to that of Śaṅkha-likhita, who declare that from a Brāhmaṇa father on a Kṣatriya mother *only a Kṣatriya is born* (p. 814), and similarly when Kṣatriya procreates a son on a Vaiśya woman, and a Vaiśyan a Śūdra woman, the sons are of the *varṇa* of the mothers only.

It may be noted that such marriages (*sambandham*) have been widely in vogue in Keraḷa (Malabar) and the position taken there is that of Śaṅkhalikhita. The sons in such cases, if brought up in the families of fathers, behave like them, and are *almost* like their fathers, and eat with them in the same room, though in different rows (*paṅkti*).

*Rise or Fall in Status (Jātyulkṛṣṭa, and Apakṛṣṭa)*

Manu declares that if a woman born of a Brāhmaṇa father and a Śūdra mother bears children to a Brāhmaṇa or the two next *varṇas*, and her female descendants do likewise, they attain the status of the Brāhmaṇa etc. in the *seventh* generation; and conversely, they sink to the level of Śūdras if they act conversely (p. 825). For similar unions in other *varṇas* fewer generations of such marriage are held to raise the level of the sons. But in Kerala, where in royal and aristocratic families, the custom has been for the women to marry only the highest type of Brāhmaṇa, the Nambūdiri, the children (sons and daughters) though in habits and outlook are like the fathers, are still deemed to belong only to the mother's *varṇa*, though held to be better than common persons of that *varṇa*. The practice is now fading, except in royal families. In such cases, of consistent marriage of women with Brāhmaṇas or higher *varṇas*, the children are said to lose their *varṇa* in the 5th genera generation. Thus Baudhāyana (p. 825) states that children of *Niṣādas* on *Niṣāda* women lose their Śūdra status in the fifth generation (The *Niṣāda* is the son of Brāhmaṇa on a Śūdra woman, and is *anuloma* by birth).

Though allowed by some courts in India, marriages between Brāhmaṇas with Śūdra women is among the practices said to be interdicted as *kalivarjya*, to be given up in the Kaliyuga, *i. e.* our times. Similarly, only two types of sons (*aurasa* and *dattaka*) are allowed in Kaliyuga and the others are prohibited for our times. Nevertheless the *smṛtis*, which are the compositions of this *yuga* mention many types of sons, and Lakṣmīdhara has followed the authorities in dealing with them at length. It is noteworthy that in his work there is no mention of acts forbidden for Kaliyuga (*kalivarjyāḥ*). Neither Medhātithi nor Viśvarūpa make mention of them. The prohibited practices rest mostly on purāṇic authority, and though Lakṣmīdhara cites the great Purāṇas and even some the minor ones, his overlooking the prohibition may either indicate the inclusion of *kalivarjya* passages in purāṇas in late times, or his recognizing that *kalivarjya* customs might still be in vogue and will have to be considered, when they rest on high śāstraic authority.

Rise in status follows not only from the marriage of women of a *varṇa*, generation after generation, with men of a higher *varṇa*, but by strictly adopting the duties and ways of the superior *varṇa* by the offspring of such unions. This has been so in Kerala. Doing so raises the status of one of a lower *varṇa* in society, above that of his *varṇa*. Conversely, when a person changes his status or profession, he must logically change his *varṇa* also. An instance of it is found in South Indian history. Mayūra Śarman, a Brāhmaṇa (as the suffix attached to his name shows) called himself Mayūra *Varman* when he founded a kingdom and became the progenitor of the Kadamba dynasty. The famous story of

the rebuke administered by Rāma Śāstri, the chief judge of Mahārāṣṭra, to the Peshwā Mādhavarāv I, when, for not recognizing him and hearing his report when the chief judge came to make it to the Peshwā, Mādhavarāv pleaded that he was lost in yogic meditation as a Brāhmaṇa should, that a ruler was no Brāhmaṇa proper and must follow the practices of Kṣatriyas, this principle is illustrated.

The many vicissitudes through which every part of India had to pass through the centuries must have made for mixture of varṇas, and mixture again of mixed castes with one another, whether *anuloma* or *pratiloma*, creating numerous subcastes, the members of which followed their own inclinations as regards duties and professions. The long lists cited by Lakṣmīdhara of such groups, *anuloma* and *pratiloma*, and of their professions (*karma*), on pp. 829 to 833, may have gone out of use atleast partially in his own days. Even the rules regarding the places of dwelling for caṇḍālas and their relegation to the duties of public executioners, and compulsion to live apart from villages outside their bounds, living like members of wild tribes, and acting as undertakers to carry corpses of persons without relations (p. 832) may have become modified. Their enunciation in the *nibandha* might be to indicate what may be done for them or persons like them in the kingdom. But even such persons are reclaimable by good acts. Thus, unselfish devotion to others may secure beatitude even to caṇḍālas. "Dying without expectation of reward in defence of Brāhmaṇas and cows, or in defence of women and children, even outcasts win beatitude" (Manu, p. 833). Duties are the same for all, from the caṇḍāla upwards. Lakṣmīdhara cites Devala in enunciating them: "living according to the rules of their caste (*jāti*); protection and conservation of all authority (*sarvāpramāṇa*) and attachment to them: maintenance of dependants: avoidance of wrong acts—these are the duties of all from the lowest to the highest (*ācaṇḍāladharmaḥ*). The work ends with a citation from Devala and another from Manu enunciating as the summary of human duties these, *viz.*, abstention from injuring living creatures, truthfulness, abstention from unlawful appropriation of the goods of others, personal purity and self-control:

"A ruler's prosperity" declares Devala, "good name and happiness and sense of duty grow when he sees to it that all subjects, of all *varṇas*, cooperate in sustaining society, by following their appointed duties and functions."

This is an appropriate declaration to append to a digest on Vyavahāra.

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श्रीः

## INDEX OF HALF VERSES

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अंशमंशं यवीयांसः,  
अंशिहीनं समं कृत्वा,  
अकरः श्रोत्रियो राजा  
अकल्यकालस्थविर,  
अकल्यादीनपि शनैः,  
अकामतः कामचारे,  
अकाममननुज्ञातं,  
अकारणे च विक्रोष्टा,  
अकुर्वन् स सदा दण्ड्यः,  
अकुर्वन् स्वामिने दाप्यो,  
अकूटं कूटकं ब्रूते,  
अकृतः स विज्ञेयो,  
अकृतं तदपि प्राहुः,  
अकृता वा कृता वापि,  
अकृतोऽपि भवेत्साक्षी,  
अकृत्रिममसंगूढं.  
अक्रमेण तु संगच्छन्,  
अक्रमोढा सुतश्चैव,  
अक्रमोढा सुतस्त्वृक्षी,  
अक्रियाकारिणश्चैव,  
अक्रूरहृदयः शान्तः,  
अक्रोधलोभाः शास्त्रज्ञाः,  
अक्षता च क्षता चैव,  
अक्षतायां क्षतायां वा,  
अक्षभङ्गे च यानस्य,  
अक्षमां वाऽनवेक्षन्ती,  
अक्षमाला वसिष्ठन,  
अक्षवध्न शलाकावैः,  
अक्षाः सबीजाः कुहकाः,  
\*अक्षार्धमेव,

मनु., ६६१  
पिता., २२७  
वसि., ७९०  
कात्या., ५५  
,, ५६  
याज्ञ., ४६२  
कात्या., २९४  
याज्ञ., ५६०  
कात्या., ४२४  
बृह., ४६०  
याज्ञ., ५१५  
मनुयमौ, ३५३  
नार., २७२  
देव., ७२५  
बृह., १०१  
नार., २४१  
,, ४०९  
कात्या., ६६९  
,, ६६९  
बृह., ५०८  
पिता., २३४  
बृह., २७  
याज्ञ., ६४६  
,, ७२८  
मनु., ५०१  
कात्या., ६४७  
मनु., ६०९  
नार., ७६१  
मनु., ७६१  
विष्णु., ८०८

अक्षेत्रे बीजमुत्पद्यम्,  
अगतस्यपि देयं स्यात्,  
\*अगुप्तं गोपयेत्,  
अगुप्तमङ्गसर्वस्वी,  
अगुप्ते क्षत्रियावैश्ये,  
अगृहीते धने तत्र,  
अगृहीते समं दाप्यो,  
अग्निं शुश्रूषितो यत्र,  
अग्निं प्रजापतिं चेष्ट्वा,  
अग्निदानां च ये लोका,  
अग्निदानं भक्तदाश्चैव,  
अग्निर्जलं वा शूद्रस्य,  
अग्निवर्णं तु तच्चोरो,  
अग्निवर्णं न्यसेत्पिण्डं,  
अग्निवर्णमयः पिण्डं,  
अग्निशिष्टां हि शुश्रूषां,  
अग्निहोत्रं त्रयो वेदाः,  
अग्नेः शिशिरहेमन्त,  
अग्नेर्विधिं प्रवक्ष्यामि,  
अग्नौ सुवर्णमक्षीणं,  
अग्न्यागामिनः शास्ति,  
अग्रं नवेभ्यः सस्येभ्यो,  
अघशंस्यात्मविक्रेतु  
अङ्कयित्वा भगाङ्केन,  
अङ्गच्छेदी वियोज्यः स्यात्,  
अङ्गच्छेदे तदर्धं तु,  
अङ्गच्छेदार्धकस्त्वर्धं,  
अङ्गहीनास्तु कर्तव्या,  
अङ्गादङ्गात्संभवसि,  
,,  
अङ्गावपीडनायां च,  
अङ्गावपीडने चैव,

मनु., ८२४  
बृहमनु., ४०७  
हारी., ६२४  
मनु., ५९०  
,, ५८९  
प्रजा., ९७  
याज्ञ., ४०३  
कात्या., ६१३  
जावा., ७२७  
याज्ञ., १२५  
मनु., ५४८  
याज्ञ., २०४  
बृह., २५३  
याज्ञ., २२९  
नार., २२७  
कात्या., ६१२  
श. लि., ७४२  
पिता., २०३  
बृह. (पिता.), २२४  
यज्ञ., ५२४  
नार., ६००  
,, ८०३  
,, ११०  
बृह., ५८५  
कात्या., ८०२  
,, ८०१  
बृह., ८०१  
याज्ञ., ५२२  
बौध्वा., ७२०  
श. लि. ७२०  
मनु., ४९३  
बृह., ४९३

\* Star mark indicates Sūtras.

अङ्गुलीग्रन्थिमेदस्य,	मनु.,	५३२	अतः प्रत्यक्षमार्गेण,	,,	१४
अङ्गुल्योरेव वा छेदं	,,	५९७	*अत ऊर्ध्वं रिकथभागः	श. लि.,	६४९
अङ्गुष्ठाङ्गुलियोगेन,	पिता.,	२५२	अत ऊर्ध्वं सकुल्यः स्यात्,	मनु.,	७४८
,,	बृह.,	,,	अतथ्यं तथ्य भावेन,	कात्या.,	१६९
अचिरात्तं दुरात्मानं,	मनु.,	१८	अतथ्यं श्रावितं राजा,	,,	४८४
अचौरश्चौरतां प्राप्तो,	नार.,	१४	अतथ्यान्यपि तथ्यानि,	महाभार.,	१५
अचौराद्वापितं द्रव्यं,	कात्या.,	५४७	अतस्तद्विपरीतेन,	बृह.,	६६६
अचौरा अपि दृश्यन्ते,	नार.,	५४७	अतस्तान्यातयेद्राजा,	बृह.,	५४१
अच्छलेनैव चान्विच्छेत्,	मनु.,	३४६	अतस्त्वं दर्शयात्मानं,	पिता.,	२३७
अजडापोगण्डधनं,	गौत.,	१८७	अतिक्रान्ते सप्तरात्रे,	बृह.,	७३
*अजडापौगण्डधनं,	,,	१८९	अतिक्रामन्ति ये पापाः,	बृहमनु.,	४५६
अजशृङ्गनिर्मं श्यामं,	कात्या.,	२४१	अतिक्रामन्देशकालौ,	मनु.,	३२८
अजातेष्वपि सस्येषु,	,,	४६४	अतिक्रामेत्प्रमत्तं या,	,,	६१५
अजातौ जातिकरणे,	याज्ञ.,	५२२	अतीतायामप्रजसि,	,,	६९०
अजाविकं चैकशर्फं,	मनु.,	६७४	अतोऽन्तरा धनं दत्त्वा,	व्यास.,	२९८
अजाविकं तु विषमं,	मनु.,	६७४	अतोऽन्यगमने स्त्रीणां,	नार.,	६४२
अजाविके तु संरुद्धे,	मनु. नार.,	४१७	अतोऽन्यथांशभाजस्तु	,,	७५५
*अजाविकेऽर्धत्रयोदशं,	श. लि.,	५२९	अतोऽन्यथा क्लेशभाक् स्यात्,	नार.,	४५८
अजाविके सवत्से तु,	नार.,	४६६	अतोऽन्यथा च प्रहरन्,	मनु.,	४९४
अजेयत्वं लोकपक्त्तिः,	बृह.,	१०	अतोऽन्यथा प्रवृत्तस्तु,	यम.,	४९४
अज्ञातपितृको यस्तु,	नार.,	७२९	अतोऽन्यथा भावनीयाः,	व्यास.,	१२२
अज्ञातश्चास्मि तत्काले,	व्यास.,	६८	अतोऽन्यथा वर्तमानः,	नार.,	६४०
*अज्ञानतः यः परद्रव्यं,	विष्णु.,	३५४	अतोऽन्यथा वर्तमानो,	मनु.,	५२४
अज्ञानतिमिरोपेतान्,	बृह.,	३३	अतोऽन्येन प्रकारेण,	कात्या.,	५८२
अज्ञाननाशितं चैव,	कात्या.,	३४९	अतोऽन्येषु तु कार्येषु,	,,	२१२
अज्ञानाज्ज्ञानपूर्वं तु,	मनु.,	३५२	अतोऽन्येषु विवादेशु,	,,	१४४
अज्ञानाद्वे शते पूर्णे,	,,	१४१	अतोऽन्यैर्यत्कृतं कार्यं,	,,	२८
अज्ञानाद्बालमावाच,	,,	१४१	अतोऽर्वाक् पण्यदोषस्तु,	बृह.,	४३५
अज्ञानोक्तौ दण्डयित्वा,	कात्या.,	४४६	अत्यारात्परकुञ्जस्य,	,,	४५३
अज्ञानौषधिमन्त्रस्तु,	बृह.,	५२०	*अत्र च प्रणष्टस्वामिकद्रव्ये,	बौधा.,	३६३
अजेष्ठवृत्तिर्यस्तु स्यात्,	मनु.,	६५०	अत्राहममुकः साक्षी,	याज्ञ.,	१५५
अतः क्रिया सदा प्रोक्ता,	कात्या.,	८७	अथ कार्यविपत्तिस्तु,	कात्या.,	३४८
अतः परं प्रवक्ष्यामि,	नार.,	२२५	*अथ चेच्छूद्रा,	विष्णु.,	६१२
,,	,,	२४०	अथ चेत्प्रतिभूर्नास्ति,	कात्या.,	५७
,,	,,	१४५	अथ देवविसंवादात्,	,,	२४७
अतः पुत्रेण जातेण,	,,	३१३	*अथ द्वादश पुत्रा,	विष्णु.,	७१९

*अथ घटः, चतुर्हस्तोच्छ्रितो	,,	२१४	अदण्ड्यागन्तुका गौश्व,	,,	,,
अथ पञ्चत्वमापन्नो,	कात्या.,	१६८	अदण्ड्याश्चोत्सवे गौश्व,	,,	,,
अथ प्रागेव दत्ता स्यात्,	,,	३७९	अदण्ड्या हस्तिनोऽश्वाश्च,	,,	,,
अथ पुत्रस्य पौत्रेण,	श. ल. विष्णु,	} ७४२	अदण्ड्यो मुच्यते राज्ञा,	मनु.,	३५३
	वसि. हारी.,		*अदण्ड्यौ मातापितरौ,	श. लि.,	७४७
*अथ ब्राह्मणस्य क्षत्रि.,	विष्णु,	७००	अदत्तं तु भयक्रोध,	नार.,	३७४
,, ब्राह्म,	,,	६९९	अदत्तत्यक्तविक्रीतं,	कात्या.,	३५३
*अथ ब्राह्मणस्य	,,	७००	अदत्तायां तु यो जातः,	ब्रह्म. पु.,	७२९
*अथ भ्रातृणां दायविभागः,	वसि.,	६६३	अदत्तेऽन्यत्र सप्तमयात्,	नार.,	४३४
अथ मूलमनाहार्य,	मनु.,	३५२	अदत्तेऽर्थेऽखिले बन्धं,	बृह.,	२९५
*अथार्तिवजि वृत्ते,	श. लि.,	३६६	अदत्त्वा तु कृते दाप्यः,	कात्या.,	३८०
*अथ लेख्यं (त्रि)विधम्	विष्णु.,	१५३	अदत्तकारयित्वा तु,	नार.,	४०७
अथवा कालनियमो,	नार.,	१०४	अदद्याद्याच्यमानस्तु,	,,	३३६
अथवा कियतो राज्ञे,	,,	७६४	अदर्शयन् स तं तस्य,	मनु.,	३०६
अथवा बन्धनं रज्ज्वा,	यम,	५७३	अदर्शयित्वा तत्रैव,	,,	३२८
अथवा शुद्धभावेषु,	पिता,	२२९	अदातरि पुनर्दत्ता,	,,	३०६
अथ विंशतिवर्षाणि,	कात्या.,	१७१	अदास इति चोक्तत्वा तु,	नार.,	३९३
*अथवैकपिण्डे,	हारी.,	७२३	अदापकं तु ब्रह्मस्वं,	देव.,	७५१
अथ शक्तिविहीनस्स्यात्,	नार.,	३२७	अदुष्टं चर्त्विजं याज्यो,	नार.,	३६८
*अथ शपथक्रिया,	विष्णु.,	१९८	अदुष्टत्यक्तदारस्य,	नार., कात्या.,	५८३
*अथ शूद्रापुत्राबुभौ,	,,	७००	अदुष्टमेव काले तु,	कात्या.,	४३५
अथ संप्रामशीलानां,	ब्रह्म. पु.,	७३६	अदुष्टां लभते त्यक्तुं,	देव.,	६१६
अथ सपेण वा दष्टो,	नार.,	४६८	अदुष्टान् दूषयन्वादी,	बृह.,	१२०
अथ स्वहस्तेनारूढः,	कात्या.,	१०४	अदुष्टास्ते तु यद्ब्रूयुः	,,	१९२
*अथ हास्यवेदमुपशृण्वन्,	गौत.,	४८१	,,	,,	४४७
*अथादायादबन्धूनां,	वसि.,	७१३	अदूषितं च स्पष्टं च,	कात्या.,	१६९
*अथाप्युदाहरन्ति,	वौधा.,	७२०	अदूषितानां द्रव्याणां,	मनु.,	५६५
,,	वसि.,	७२९	अदृष्टाभ्रावितं लेख्यं,	व्यास.,	१७४
अथजाविकवत्सनां,	कात्या.,	४५८	अदेयमथ देयं च,	नार.,	३७३
अथवेद्य प्रयुक्तस्तु,	,,	४६४	अदेयादिकमाख्यातं,	बृह.,	३८३
*अथैकपुत्रा ब्राह्मणस्य,	विष्णु.,	७००	अदेयान्याहुराचार्या,	नार.,	३७४
*अथोत्तमर्णोऽधमर्णकात्,	,,	२८१	अदेशं यश्च दिशति,	मनु.,	८०
अथोपगमयेदेनं,	नार.,	३९१	अदेशकालदत्तानि,	बृह., कात्या.,	२१२
अद्वयं तं विदुर्देवाः,	कात्या.,	२३२	अदेशकालदृष्टत्वात्,	नार.,	५४३
अदण्ड्यं दण्डयन् राजा.,	मनु.,	७९६	अदेशकालसंभाषं,	याज्ञ.,	५८०
अदण्ड्याः काणकूटाश्च,	उशना.,	४६९	अदेशकालसंभाषा,	व्यास.,	५७७

अद्भ्यश्चाभिरभूत्,	नार.,	२३७	अनपत्यस्य धर्मोऽयम्,	बृह.,	७५५
अद्यात्काकः पुरोडाशं,	मनु.,	७९५	अनपत्यस्य पुत्रस्य,	मनु.,	७४८
अद्रव्यां मृतपत्नीं तु,	मत्स्यपु.,	५९४	अनपत्यस्य शुश्रूषुः,	,,	७०४
अद्वेषलोभाद्यद्ब्रूयुः,	बृह.,	८५	अनमिज्ञो जितो मोच्यो,	कात्या.,	७६७
अधनस्य...पुत्रस्य,	नार.,	३१९	अनयन् भारयित्वा तु,	नार.,	४०७
अधनास्त्रय एवोक्ता,	नार.,	३९३	अनयन् वाहकोऽप्येवं,	,,	४०७
अधमोत्तममध्यानां.	कात्या.,	४६९	अनर्थशीलां सततं,	,,	६१६
अधमो भारवाहः स्यात्,	बृह.,	३८६	अनार्थत्वान्मनुष्याणां,	महाभार.,	६०७
अधरीकृत्य तत्पत्रं,	व्यास.,	९६	अनवस्था भवेद्दोषः,	व्यास.,	१२१
*अधर्मचर्यया	आप.,	८२६	अनाकारितमप्यूर्ध्वं,	नार.,	२८७
अधर्मज्ञान्यदा राजा,	कात्या.,	३४	अनाकालभृतस्तद्वत्,	,,	३८७
अधमर्णार्थं सिद्धयर्थं,	मनु.,	३३१	अनाकाले भृतो दासात्,	,,	३९१
अधर्मतः प्रवृत्तं तु,	कात्या.,	३५	अनाक्षेपः परेभ्यश्च,	,,	८०३
अधर्मदण्डनं लोके,	याज्ञ.,	७९६	अनाख्यातं व्यवहितं,	बृह.,	३३८
*अधर्मस्य तद्द्वारम्,	संवर्तः,	१७२	अनागमं तु यद्भुक्तं,	यम.,	१३
अधर्मो नृपतेर्दृष्टो,	मनु.,	७९६	अनागमं तु यो भुङ्क्ते,	नार.,	१८५
अधस्ता प्रहर्तव्यं,	यम.,	४९४	,,	यम.,	१४
अधार्मिकं त्रिमिन्यायैः,	मनु.,	७८२	अनागमेन भुक्तं यत्.	नार.,	१८४
अधिकांश्छादयेदर्धान्,	कात्या.,	६३	अनाच्छेद्यकरास्तेभ्यः,	बृह.,	४१९
अधिकारोऽभियुक्तस्य,	,,	७५	अनाच्छेद्यमनाहार्यं	,,	१५४
अधिष्ठाता ऋणं दाप्यः,	बृह.,	३१७	,,	व्यास.,	१५७
*अधिष्ठानाग्निर्हारः,	वसि.,	५१८	अनाथास्ते तु निर्दिष्टाः,	कात्या.,	८००
अधोगतिर्न शुद्ध्येत,	व्यास.,	२२३	अनादेयास्तु ते सर्वे,	बृह.,	४८
*अधोवर्णानामुत्तम,	हारी.,	४९०	अनादेशो भवेद्वादो,	बृह., नार.,	५०
अध्यक्षः सभ्यसहितः,	बृह., कात्या.,	१०१	अनापदिस्थः शक्तः सन्,	कात्या.,	३९९
अध्याग्न्यध्याहवनिकं,	नार.,	६९३	अनापृच्छय तु गृहानो,	शं. लि.	५३८
,,	मनु.,	,,	अनाम्नातानि कार्याणि,	बृह.,	७७५
*अध्यर्धाः स्त्रियः,	वसि.,	७८८	अनार्यता निष्ठुरता,	मनु.,	८२८
अध्यासनात्समारभ्य,	बृह.,	१७८	अनार्यमार्यकर्माणम्,	,,	८२६
अध्याहवनिकं नाम,	कात्या.,	६९४	अनार्यायां समुत्पन्नो,	,,	८२३
अध्वरेषु यथाऽध्वर्युः,	पिता.,	२१३	अनावृतं चेतन्नाशं,	नार.,	४६२
अनंशौ क्लीबपतितौ,	मनु.,	६६६	अनावेद्य तु राज्ञे यः,	बृह.,	३३०
अनन्तरः स्मृतः पुत्रः,	नार.,	८१५	अनाश्रित्य पितृद्रव्यं,	व्यास.,	६७६
अनन्तरः स्मृतः सूतो	,,	८१६	अनिच्छतः प्राभवत्वात्,	मनु.,	३९८
अनन्तरासु जातायां,	मनु.,	८१२	अनिच्छन् शुल्कदाताऽपि,	नार.,	४०८
*अनन्ताः पुत्रिणो,	वसि.	७४३	अनिच्छन्तमभूमिज्ञं,	व्यास.,	५२०

\* Star mark indicates Sūtras.



अनिच्छन्ती तु या भुक्ता,	बृह.,	५९४	अनुमानं विदुर्हेतुः,	व्यास.,	२५८
अनिच्छन्त्या यक्रियते,	,,	५७७	अनुमानं सद्य एव,	बृह.,	१८२
अनिच्छेषु विवाहेषु	याज्ञ.,	८७३	अनुमानाद्वरः साक्षी,	,,	१८१
अनियम्यांशकर्तृणां,	कात्या.,	३७२	अनुमानेन निर्णतं,	,,	२५९
अनियुक्तासुतश्चैव,	मनु.,	७४४	अनुमानेन सभ्रान्ते,	,,	९४
अनिर्णीते विवादे तु,	बृह.,	७६	अनुमार्गेण कार्येषु,	कात्या.,	३३९
अनिर्देशाहां गां सूतां,	मनु.,	४६८	*अनुलोमाः	गौत.,	८१५
अनिर्दिष्टं च निर्दिष्टं,	कात्या.,	३०२	*अनुलोमाश्चत्वारः,	देव.,	८११
अनिर्दिष्टं तु सौवर्णं	,,	८०९	अनुशास्य च विश्वास्यः	नार.,	४९४
अनिर्दिष्टस्तु यो राज्ञा,	नार.,	७६६	अनुशास्य स गुरुणा,	नार.,	४९४
अनिर्दिष्टस्तु साक्षित्वे,	,,	११४	अनुशिष्टौ विसर्गे च,	नार.,	२७५
अनिर्दिष्टाश्च ये कुर्युः	कात्या.,	३१	अनुसृत्य तु गृहीयात्,	,,	५१०
अनिर्दिष्टो वार्यमाणः	बृह.,	३६०	*अनूढायाः कन्यायाः,	विष्णु.,	६७१
अनिवृत्ते तु यद्यर्थे,	कात्या.,	३९	अनृतं तु वदन् दाप्यः,	मनु.,	७९१
अनिवृत्ते सपिण्डत्वे,	बृह.,	१८९	अनृतस्यापवादैश्च,	नार.,	१२६
*अनिवेदितप्रवेशे,	श. लि.,	५८६	अनृतस्यैनसस्तस्य,	मनु.,	१४७
अनिवेदितविज्ञातं,	याज्ञ.,	७९२	अनृताख्यानशीलानां,	कात्या.,	४८४
*अनिवेदितविज्ञातस्य,	विष्णु.,	७९३	*अनृताभिशंसने,	हारी.,	४८०
अनिवेद्य तु यो राज्ञे,	नार.,	८२	अनृतावृतुकाले तु,	मनु.,	६२७
अनिवेद्य नृपे दण्ड्यः	याज्ञ.,	३५७	अनृतेन तु युज्येत,	यम.,	२५७
अनिश्चित्य भृतिं यस्तु,	याज्ञ.,	४०१	अनेकदोषदुष्टेऽपि,	कात्या.,	६३८
अनिषिद्धा यथा कालं,	कात्या.,	४५५	अनेकधा कृताः पुत्राः,	बृह.,	६४४
अनिषेद्धा क्षयो यस्य,	,,	५७४	अनेकधात्वभिहिता,	,,	३८२
अनीशः पूर्वजे पित्र्ये,	बृह.,	७०५	अनेकपदसंकीर्णः,	कात्या.,	४९
,,	,,	७०६	अनेकपितृकाणां तु,	याज्ञ.,	६६२
अनु कुर्यादनुब्रूयान्,	कात्या.,	४७१	*	विष्णु.,	७०९
अनुकूलामवागदुष्टां,	नार.,	६१५	अनेकानि सहस्राणि,	मनु.,	६३७
*अनुज्ञानं वा,	गौत.,	७७८	अनेकार्थाभियुक्तेन,	नार.,	२६५
अनुक्तं तत्र यो ब्रूयात्,	कात्या.,	७३	अनेकार्थाभियोगेऽपि,	कात्या.,	३१०
*अनुक्तद्रव्याणामपहर्ता,	विष्णु.,	५३७	अनेन कर्मणा नैते,	बृह.,	२१
अनुद्विग्नेन चित्तेन,	कात्या.,	१३६	अनेन क्रमयोगेन,	मनु.,	३६६
अनुपपन्नं पितृद्रव्यं,	मनु., वि.,	६७६	*अनेन क्रमेणान्य,	विष्णु.,	७००
अनुपस्थापयन्मूलं,	कात्या.,	३५६	अनेन तु विधानेन,	मनु.,	७२६
अनुभावी तु यः कश्चित्,	मनु.,	११७	अनेन नारीवृत्तेन,	,,	६२९
अनुभूय सुदुःखांस्तान्,	नार.,	१३४	अनेन विधिनाख्यातं,	याज्ञ.,	३६४
अनुमानं च द्विविधं,	बृह.,	९२	अनेन विधिना जातः,	,,	६४१

अनेन विधिना ज्ञेयं,	कात्या., २४१	अन्यत्र श्रावितं यत्स्यात्,	नार., ११५
अनेन विधिना दत्तं,	,, ३७८	अन्यत्र स्वामिसन्देशात्	,, २७२
अनेन विधिना यत्तु,	,, ७७४	*अन्यत्रानुज्ञानाद्भर्तुः,	वसि., ७३१
अनेन विधिना राजा,	मनु., ७६९	अन्यथा कारिता वृद्धिः,	कात्या., २८३
अनेन विधिना लेख्यं,	कात्या., १६०	अन्यथा क्रियते यत्र,	बृह., ७७१
,,	व्यास., १५८	अन्यथा तुल्यदोषः स्यात्,	कात्या., ४८४
अनेन विधिना शास्यः,	मनु., ३५२	अन्यथा न प्रकुर्वीत,	,, ३७५
अनेन सर्वपालानां,	नार., ४१७	अन्यथा न भवेज्जाभो,	बृह., ४५०
अनेनासाविदं प्रोक्तं,	,, २२८	अन्यथा न विशुद्धः स्यात्,	पिता, नार., २३९
अन्तःप्रच्छन्नपापानां,	हारी., ७७७	अन्यथा नैव कर्तव्यम्,	कात्या., ३८
अन्तरं तु तयोर्हस्तौ,	पिता., २१४	अन्यथा बाधनं यत्र,	,, २६२
अन्तरा पतिते पिण्डे,	याज्ञ., २३१	अन्यथा मूलतः कार्यं,	,, १६९
*अन्तरालः षट्,	देव., ८१२	अन्यथा वादिनो यस्य,	याज्ञ., १५०
अन्तराला भवन्त्येवम्,	,, ८२०	अन्यमुद्दिश्य यो वेश्यां,	मत्स्यपु., ४०९
अन्तरिक्षगतांश्चैव,	मनु., ७९५	*अन्यवर्णस्त्रीजा,	शं. लि., ७००
अन्तरे तु तयोर्गः स्यात्,	याज्ञ., ५६३	*अन्यवर्णस्त्रीजातानां,	,, ,
अन्तर्गतजलं सम्यक्,	पिता., २३८	अन्यवादी क्रियाद्वेषी,	नार., ८१
अन्तर्गृहे बहिर्गृहमात्,	बृह., ३५५	अन्यसंज्ञानुयोगी च,	कात्या., ४७३
अन्तर्वैमनि रात्रौ वा,	कात्या., ११७	अन्यस्य भुञ्जतः पश्चात्,	बृह., १८८
अन्तर्वैमन्यरण्ये वा,	बृह., ४९५	अन्यस्मिन् हि नियुञ्जाना,	मनु., ६४२
,,	मनु., ११७	अन्यहस्तात्परिभ्रष्टं,	कात्या., ५४७
अन्तर्हितं हरन् शुद्धः,	बृह., २३३	अन्यहस्तेन विकीर्तं,	याज्ञ., ४३२
अन्तिमा स्वैरिणीनां या,	नार., ३१९	अन्याक्षरनिवेशेन,	नार., ६१
*अन्यवृद्धौ प्रविष्टायां,	विष्णु., २८६	अन्यापदेशवादी च,	कात्या., ४७३
अन्यामिगमने त्वङ्गयः,	याज्ञ., ५८९	अन्ययतो यियासन्तं,	,, ३५
अन्धोऽचिक्रिस्स्यरोगाद्या,	,, ६६७	अन्यायवादिनः सभ्याः	बृह., ३९
अन्धो मत्स्यानिवाश्नाति,	नार., हारी., ३४	,,	,, ५२१
,,	मनु., १३२	अन्यायेन तु यद्भुक्तं	नार., १७९
अन्नपानमहादानैः,	नार., ५४६	अन्यायेन पुनर्ग्रामं,	बृह., ४८
अन्नमेषां पराधीनं,	मनु., ८३२	अन्यायोपार्जितं न्यस्तं,	कात्या., ८०६
अन्यं संश्रावयेत्तं तु,	बृह., १००	अन्यायोपात्तवित्तत्वात्,	बृह., ५४१
अन्यक्षेत्रेषु जातानां,	कात्या., ४५७	अन्यार्थः स्वार्थहीनश्च,	बृह., ४९
अन्यग्रामात्समाश्रित्य,	व्यास., ४५०	अन्यार्थमर्थहीनं च,	नार., ६१
अन्यत्र ब्राह्मणान् किन्तु,	नार., ७५१	अन्यूनं चेन्निगदितं,	व्यास., १६०
अन्यत्र रजकव्याध,	नार., ३१७	अन्येन हारयेद्विव्यम्,	कात्या., २०७
*अन्यत्र वणिक्प्रव्रजित,	शं. लि., ६२२	अन्येन हि कृतः साक्षी,	,, ११६

अन्येऽपि शङ्कया प्राह्या,	याज्ञ.,	५४४	अपराधानुपूर्वेण,	बृह.,	१९८
अन्ये पुनरनेर्दिष्टाः,	नार-कात्या.,	९९	*अपराधानुरूपं च,	विष्णु.,	७७९
अन्येषामेवमादीनां,	मनु.,	५३५	अपराधानुरूपश्च,	बृह.,	२६५
अन्येषां लग्नक्रोपेतं,	बृह.,	३५९	*अपराधेषु चैनं,	आप.,	४९५
अन्येष्वसह्यवादेषु,	,,	७५	अपराधेषु नियतम्,	कात्या.,	७९५
अन्यैर्वापि व्यभीचारैः,	नार.,	५७८	अपरेभ्यस्त्रयस्त्रिभ्यो,	नार.,	८१५
अन्यैश्च विविधैर्दोषैः,	,,	५७८	*अपविद्धः पञ्च,	वसि.,	७३३
अन्यैस्तु साक्षिभिः साध्ये,	व्यास.,	१२१	अपविद्धः सहोदश्च,	यम.,	७१४
अन्योदर्यस्तु संसृष्टी,	याज्ञ.,	७५७	*अपविद्धः सहोदो,	शं-लि.,	७१२
अन्योन्यं त्यजतो रागः,	नार.,	६१६	अपविद्धश्च ये पुत्राः,	ब्रह्मपु.,	७३६
अन्योन्यं परिगृहीताः,	बृह.,	७६१	*अपविद्धस्त्वेका,	विष्णु.,	७३३
अन्योन्यचक्षुरागेण,	,,	५७७	अपहवे तद्विगुणं,	मनु.,	३३३
अन्योन्यव्यतिषक्ताश्च,	मनु-विष्णु.,	८२०	अपहवेऽधमर्णस्य,	,,	८८
अन्योन्यस्याव्यभिचारो,	मनु.,	६१३	अपाङ्गप्रेक्षणं हास्यं,	बृह.,	५७८
अन्योन्यापहृतं द्रव्यं,	कात्या.,	६९५	,,	व्यास.,	५७७
अन्यो वाऽसति दायादे,	नार.,	३६१	अपात्रे पात्रमित्युक्ते,	नार.,	३८०
अन्वाधेयं तदुक्तं तु,	कात्या.,	६९४	अपितान् घातयेद्वाजा,	नार.,	४९८
अन्वाधेयं च यद्दत्तं,	मनु.,	६८८	अपित्र्यं तद्धनं प्राप्तं,	कात्या.,	६६९
अन्वारूढा जीवन्ती वा,	बृह.,	५३५	अपिवह्नाजदातृणां,	ब्रह्मपु.,	७३६
अन्वाहितं च निक्षेपः,	दक्ष.,	३७४	*अपीडयो हि,	शं-लि.,	७८४
अन्वाहितं याचितकं,	नार.,	३७३	अपुत्रकस्य कन्या स्वा,	देव.,	६७०
अन्वाहितं हृतं न्यस्तं,	नार.,	१८५	*अपुत्रघनं पत्न्य.,	विष्णु.,	७४८
अन्वाहितादि बाहृत्य,	बृह.,	३२५	*अपुत्ररिक्थस्य,	,,	७०३
अन्वाहिते याचितके,	,,	३४७	*अपुत्रस्य घनं,	विष्णु.,	७५०
अपकर्षन्ति तद्द्रव्यं,	व्यास.,	५२०	*अपुत्रस्य स्वर्यातस्य,	पैठी.,	७४८
अपकारक्रियायुक्ता,	कात्या.,	६८७	अपुत्रां गुर्वनुज्ञातो,	याज्ञ.,	६४७
अपकारक्षमो यश्च,	,,	३०५	अपुत्रा चेत्समूढा तु,	बृह.,	६८८
अपत्यं जडस्य भागार्हम्,	गौत.,	६६९	अपुत्रा प्राप्नुयात्स्वर्गं,	यम.,	६३८
अपत्यं धर्मकार्याणि,	मनु.,	६०९	अपुत्रायां मृतायां तु,	मनु.,	६९१
अपत्यलोभाद्या तु स्त्री,	,,	६३७	अपुत्रा योषितश्चैव,	याज्ञ.,	६६८
अपथ्या तु भवेत्पश्चात्,	दक्ष.,	६०६	अपुत्रा शयनं भर्तुः,	कात्या.,	६८५
अपदेशैश्च संन्यस्य,	मनु.,	३४६	,,	वृ-मनु.,	७४५
अपदिश्योपदेशं च,	मनु.,	८०	,,	,,	७४९
*अपध्वंसजाः,	मेघाति.,	८३०	अपुत्रेण च या कन्या,	ब्रह्मपु.,	७२७
अपपात्राश्च कर्तव्याः,	मनु.,	८३२	अपुत्रेण परक्षेत्रे,	बौधा.,	७२१
*अपपात्रितस्य रिक्थ.,	शं-लि.,	६६६	अपुत्रेण सुतः कार्यो,	बृह.,	७४३

अपुत्रोऽनेन विधिना,	मनु.,	७२६	अप्सु प्रवेशने यस्य,	कात्या.,	२३९
अपुर्णे तु प्रकुर्यातां,	बृह.,	२९९	अप्सु भूमिवदित्याहुः,	मनु.,	१३३
अपृष्टाः सत्यवचने,	,,	१४४	अबन्धलम्बकं चैव,	व्यास,	७७४
अप्यन्योन्यं प्रवर्तन्ते,	महाभा.,	६०७	अबन्धवं शवं चैव,	मनु;	८३२
अप्रकाशस्तु विज्ञेया,	नार.,	५०९	अबीजकमपि क्षेत्रं,	,,	८२४
अप्रकाशात् साक्षियुक्तं,	व्यास.,	१७२	अबीजविक्रयी यश्च,	,,	८२४
अप्रगल्भजडोन्मत्त,	बृह.,	७५	*अबुद्धिपूर्वमलंकृतो युवा,	आपस्त;	६८७
अप्रगल्भभयार्तानां,	,,	१७४	अब्जेषु चैव रत्नेषु,	मनु;	१३३
अप्रजां दशमे वर्षे,	बौधा,	६१७	अब्दमासतदधाहो,	व्यास;	७६८
अप्रजायां हरेर्द्वर्ता,	देव.,	६९१	अब्राह्मणः संग्रहणे,	मनु;	५८४
अप्रजायामतीतायां,	याज्ञ.,	६९१	*अब्राह्मणस्य प्रणष्टस्वामिकं,	बौधा;	३६३
*अप्रज्ञायमानं वित्तं,	वसि.,	७९१	*अब्राह्मणस्य शारीरो,	,,	५९०
अप्रज्ञा दुहिता यस्य,	,,	७२९	अब्रुवन् विब्रुवन्वापि,	मनु;	३५
अप्रत्यक्षं च यद्भुक्तं,	नार.,	१८५	अब्रुवन् हि नरः साक्ष्यं,	याज्ञ;	७४३
अप्रत्ययोदयश्च स्यात्,	बृह.,	३६	अभक्ष्यमथ चापेय,	मनु,	५६४
अप्रपञ्चापि सा दाप्या,	कात्या.,	३१८	अभक्ष्यभक्षणे चैव,	कात्या,	७५
अप्रमत्ता रक्षतु तम्,	मनु.,	६०३	अभक्ष्यस्याविक्रयस्य,	विष्णु;	५६६
*अप्रमत्ता रक्षथ तन्तुमेतं,	आप.,	७३७	अभक्ष्यापेयकथनं,	बृह;	४७३
अप्रमोदात्पुनः पुत्रः,	मनु.,	६१३	*अभक्ष्येण ब्राह्मणं,	विष्णु,	५६३
अप्रयच्छन् पिताकाले,	बृह.,	६०४	अभयस्य हि यो दाता,	मनु.,	५११
अप्रयच्छंस्तथा शुल्कं,	नार.,	४०९	अभावयन् दमं दाप्य;	व्यास,	२१२
अप्रवृत्तं कृतं यत्र,	कात्या.,	२२	अभावे ज्ञातयस्तेषां,	याज्ञ.	६०२
जप्रवृत्तौ स्मृतः काल,	नार.,	६४२	अभावे दुहितृणां च,	नार.,	७५७
अप्रसिद्धं पुरद्विष्टं,	बृह.,	५१	अभावे बीजिनो माता,	,,	२७५
अप्रसिद्धं सदोषं च,	,,	४८	अभावेऽर्थहरा ज्ञेया,	कात्या.	७५७
अप्रसूता तु चत्वारि,	नार.,	६४१	अभिगन्तास्मि भगिनीं,	याज्ञ.,	४७६
अप्राणिमिर्यक्रियते,	मनु.,	७६१	अभिधाते तथा मेदे,	,,	५५८
अप्राप्तव्यवहारं च,	याज्ञ.,	५६९	अभिचारेषु सर्वेषु,	मनु.,	५६५
अप्राप्तव्यवहारश्च,	नार.,	५४	अभिज्ञानैश्च बलमीकैः,	नार.	४४५
,,	,,	३१३	*अभिमन्त्रितमम्भः,	विष्णु.	२३५
अप्राप्तेऽर्थे क्रियाकारे,	कात्या.,	४३१	अभिमन्त्र्यास्यकरयोः,	,,	२२९
अप्राप्ते वा स काले तु,	,,	३४८	अभियुक्तं न चान्येन,	याज्ञ.,	७२
अप्रियस्य तु यो वक्ता,	,,	५६९	अभियुक्तं प्रयत्नेन,	कात्या.,	२४७
अप्रियोक्तिस्ताडनं च	बृह.,	४७२	अभियुक्तः प्रमीतश्चेत्,	बृह.	७६५
अप्सु प्रवेश्य तद्गण्डं,	मनु.,	७८७	अभियुक्तश्च रुद्धश्च,	कात्या.	५५
अप्सु प्रवेश्य पुरुषं,	बृह.,	२३५	अभियुक्तस्तथान्येन,	नार.	५४

अभियुक्ताय दातव्यं,	पिता.,	२१०	*अम्बष्ठश्चायोगवश्चेति,	पैठी.,	८१८
अभियुक्तेन वै भावं,	नार.,	८९	अम्बष्ठात् प्रथमायां,	बौधा.,	८२०
अभियुक्तोऽभियोगस्य,	बृह.,	६८	*अम्बष्ठानां जाति.,	शं. लि.,	८३०
अभियोक्ता दिशेद्देशं,	मनु.,	८८	*अम्बष्ठोऽग्रावेकान्तरा,	,,	८१५
अभियोक्ता धनं कुर्यात्,	कात्या.,	३५४	*अम्बष्ठोग्रौ	,,	,,
अभियोक्ता प्रगल्भत्वात्,	बृह.,	६२	अम्बष्ठोग्रौ तथा पुत्रौ,	नार.,	८१६
अभियोक्ताभियुक्तानां,	नार.,	२११	अम्बष्ठो ब्राह्मणाच्छूद्रयां,	याज्ञ.,	८१४
अभियोक्ता शिरस्थायी,	पिता.,	२१०	अयं द्विजैर्हि विद्वद्भिः,	मनु.,	६४२
अभियोक्त्वभियुक्तानां,	कात्या.,	१६०	अयःसन्दानगुतास्तु,	कात्या.,	५४२
अभियोगमनास्तीर्य,	याज्ञ.,	७२	अयथोक्तप्रदत्तं च,	बृह., कात्या.,	२१२
अभियोगे च साक्ष्ये वा,	,,	७८	अयशो महदाप्नोति,	मनु.,	७९६
अभियोगे न चेद्ब्रूयात्,	मनु.,	८०	अयस्तं पाणिभ्यां,	वृद्ध.,	२३३
अभिलेख्यात्मनो वंश्यान्,	याज्ञ.,	१५८	अयुक्तं चैव योब्रूयात्,	कात्या.,	४२१
अभिषिच्य तु यः कन्यां,	मनु.,	६९७	अयुक्तं शपथं कुर्वन्,	याज्ञ.,	५६१
*अभिसन्धिमात्रान्,	गौत.,	७२७	अयुक्तं साहसं कृत्वा,	नार.,	५७४
अभीक्ष्णं चोद्यमो यः,	नार.,	१९४	अयुक्ते कारणे यस्मात्,	कात्या.,	३२२
अभूतमप्यभिहितं,	,,	१६	अयोनौ गच्छतो योषां,	याज्ञ.,	५९९
अभूतैर्वाऽथ भूतैर्वा,	कात्या.,	४७२	अयोनौ यः समाक्रामेत्,	नार.,	४०९
अभोगभुक्तिः सीमा च,	,,	४३८	अरक्षकांस्तु दिक्पालान्,	का. ना.,	५५२
अभ्यन्तरे तु निक्षेपे,	,,	१०३	अरक्षिता गृहे रुद्धाः,	मनु.,	६०८
अभ्यादध्यस्तु काष्ठानि,	मनु.,	५८७	अरण्ये विजने रात्रौ,	नार.,	९४
अभ्युक्ष्य पञ्चगव्येन,	बृह.,	२५४	अरतिद्वयमुत्सृज्य,	कात्या.,	४५४
*अभ्युपगम्य दुहि,	बौधा.,	७२५	अराजदैविकं नष्टं,	याज्ञ.,	४०६
अभ्युपेतादृते यद्वा,	नार.,	३१८	अरिक्तभाजस्ते सर्वे,	नार.,	७४४
अभ्युपेत्य तु शुश्रूषां,	,,	३८२	अरुद्धासु च दासीषु,	याज्ञ.,	५९८
अभ्रातृकां प्रदास्यामि,	वसि.,	७२६	अरुन्तुदः सूचकश्च,	बृह.,	४२५
*अभ्रातृका हि पुंसः,	,,	७२४	अर्धश्चेदपचीयेत्,	नार.,	४२९
अभ्रातृको हरेत्सर्वं,	याज्ञ.,	७०५	अर्धस्य वृद्धिर्वासेन,	व्यास.,	५१२
अमतेनैव पुत्रस्य,	कात्या.,	३२२	अर्धस्य हानिं वृद्धिं वा,	याज्ञ.,	५१६
अमात्यमुख्यं धर्मज्ञं,	मनु.,	२४	अर्धोऽनुग्रहकृतकार्यः,	व्यास.,	५१७
अमात्याः प्राङ्निवाको वा,	,,	२६९	अर्ध्याक्रोशातिक्रमकृत्,	याज्ञ.,	५६०
अभिमानं भूयशः पश्येत्,	नार.,	१२७	अर्चयित्वा च तं देवं,	नार.,	२४६
*अमुक्तहस्तासु	विष्णु.,	६२१	अर्जुनस्तिलकोऽशोक,	नार.,	२१४
अमुमर्थं च पत्नस्थं,	नार.,	२२८	अर्थकालबलापेक्षं,	,,	१९७
अमेध्यं शोधयित्वा तु,	कात्या.,	४५५	अर्थदण्डवधावुक्तौ,	बृह.,	७८२
अमेध्यपाणिनिष्ठयूत,	याज्ञ.,	४८६	अर्थवन्तो यतस्सन्तो,	कात्या.,	७९६

अर्थशास्त्रात् क्लवत्,  
अर्थशास्त्रोक्तमुत्पद्य,  
अर्थस्य संग्रहे चैनां,  
अर्थस्योपरि वक्तव्यं,  
अर्थानर्थानुभां बुध्वा,  
अर्थानुरूपाः शपथाः,  
अर्थोपकर्षणं दण्डः,  
अर्थो वै वाचि निरता,  
अर्थक्रियां क्रियामेदैः,  
अर्थिनस्तद्वचः कार्यं,  
अर्थिनाभ्यर्थितो यत्नः,  
अर्थिनामुपपन्नानां,  
अर्थिना लेखितो योऽर्थः,  
अर्थिना संनियुक्तो वा,  
अर्थिना सहितः साक्षी,  
अर्थिप्रत्यर्थिनोर्वाक्यं,  
अर्थिप्रत्यर्थिवचनं,  
अर्थिप्रत्यर्थिवाक्यानि,  
अर्थिप्रत्यर्थिसान्निध्यात्,  
अर्थिप्रत्यर्थिसान्निध्ये,  
अर्थी तु लेखयेतावत्,  
अर्थी यत्र विपन्नः स्यात्,  
अर्थेऽपव्ययमानं तु,

अर्थे वापहुते वादी,  
अर्थेऽवधिकृतो यः स्यात्,  
अर्थे द्वयोरपि हृतं तत्र,  
अर्थक्षयात् परतः,  
अर्थत्रयोदशगणाः,  
अर्धात् वत्सरात्स्वामी,  
अर्धोऽथ येषु द्विगुणः,  
अर्वाक् चतुर्दशद्वयो,  
अर्वाक् शिरसमुत्क्षिप्य,  
अर्वाक् शिरास्तमस्यान्ते,  
अर्वाक् भोजयन्विप्रो,  
\*अलंकारो भाषायां,  
अलंकृतामहरत्कन्यां,

याज्ञ., १३  
नार., १४  
मनु., ६०८  
कात्या., १२३  
मनु., ५८  
व्यास., २५८  
बृह., ७४३  
नार., १२८  
बृह., ९९  
बृह., ४८  
कात्या., १९४  
महाभार., १७  
बृह., ६९  
कात्या-नार., ७६  
कात्या., १०३  
बृह., कात्या., १०१  
बृह., १००  
कात्या., १६०  
", ९८  
", १२३  
नार., ६२  
कात्या., ११५  
मनु., २६४  
मनु., ३३१  
नार., १९३  
नार., ३८६  
बृह., ३५६  
नार., ५२६  
याज्ञ., ४१६  
", ५५४  
", ४७४  
याज्ञ., २४८  
नार., १३४  
मनु., १३२  
मनु., ५५२  
आप., ६८४  
याज्ञ., ५९६

अलं धारयितुं सर्वे,  
अलब्धेण कृते लेख्ये,  
अलभात्पुरुषाणां हि,  
अलिपिज्ञ ऋणी यः स्यात्,  
अलुब्धा धनवन्तश्च,  
अलेखेऽसाक्षिके दैवी,  
अल्पं वा बहु वा कालं,  
अल्पधान्यापहरणे,  
अल्पपापसमो ज्ञेयो,  
अल्पमूल्यं तु संस्कृत्य,  
अल्पाक्षरः प्रभूतार्थो,  
अल्पापराधः स्वल्पार्थो,  
अल्पेष्वपरिपूतेषु,

अवकुशय च राजानं,  
अवगूरणनिस्सङ्गं,  
अवघुष्य च सर्वत्र,  
\*अवचने दोषिणः स्युः,  
अवधित्यागभावेन,  
अवधेनाथवा तन्वा,  
अवध्यं यस्तु बध्नाति,  
अवध्याम् ब्राह्मणानाहुः,  
अवध्या ब्राह्मणा गावो,  
अवनिष्ठीवतो दर्पात्,  
अवमूल्यतो मेढं,  
अवलम्बौ च कर्तव्यौ,  
\*अवशिष्टं सर्वं,  
अवशेनैव दैवात्,  
अवश्यं तेन वक्तव्यं,  
अवश्यकार्याः संस्काराः,  
अवष्टब्धस्योत्तरेण,  
अवष्टम्भाभियुक्तस्य,  
अवष्टम्भामि युक्तानां,  
अवस्करस्थलश्चक्रं,  
अवहार्यो भवेच्चैष,  
अवहार्यो भवेतां तौ,

नार., १३४  
कात्या., १७६  
महाभा., ६०८  
व्यास., १५६  
कात्या., २८  
", ९५  
", ६५  
व्यास., ५३७  
पिता., २२२  
बृह., ५२३  
कात्या-बृह., ६१  
बृह., ४९  
मनु., ५३४  
यम., ५३५  
नार., ४८३  
नार., ४८५  
नार., ५४७  
गौत., ७४५  
बृह., ८४  
नार., ४९४  
याज्ञ., ५६९  
यम., ७८३  
यम., ५७३  
मनु., ४९१  
", ४९१  
पिता., २१५  
विष्णु., ७९३  
कात्या., ७९७  
व्यास., १६७  
नार., ६७०  
", ६३  
कात्या., २४९  
पिता., २०९  
नार., ४५४  
मनु., ३५२  
", १८७

अवाग्दुष्टानुकूला स्त्री,  
 अवाहनरकमाप्नोति,  
 अक्क्रियाणि विक्रीणन्  
 अविज्ञातं तु यत्क्रीतं  
 अविज्ञातक्रयो दोषः,  
 अविज्ञातनिवेशत्वात्,  
 अविज्ञात विशेषाश्च,  
 अविज्ञातहतस्याशु,  
 अविज्ञाताश्रयात्क्रीतं,  
 अविज्ञातोपलब्ध्यर्थं,  
 अविद्यमाने तु शुभौ,  
 अविद्यमाने पिच्येऽर्थे,  
 अविद्यानां तु सर्वेषां,  
 अविभक्तविभक्तानां,  
 अविभक्ते निजे प्रेते,  
 अविभक्तैः कुटुम्बार्ये,  
 अविभक्तैः कृतमृणं  
 अविभज्य पृथग्भूतैः,  
 अविभाज्यं सगोत्राणां,  
 अविरोधेन धर्मस्य,  
 अविशुद्धागमो भोगः,  
 अविशेषेण सर्वेषां,  
 अवीचि नरके कल्पं,  
 अमृतिकर्षिता हि,  
 अवेक्ष्य बीजं कार्या स्यात्,  
 अवेक्ष्यंस्तु नष्टस्य,  
 अव्ययाच्छन्नविक्रोशन्,  
 अव्यमस्थितमर्यादं,  
 अव्याख्यागम्यमित्येतत्,  
 अव्याप्यसारं सन्दिग्धं,  
 अव्याहृतं लेख्ययोग्यं,  
 अव्याहृता त्रिपुरुषी,  
 अशक्य आगमो यत्,  
 अशक्यो निर्णयो ह्यत्र,  
 अशक्तप्रेतनष्टेषु,  
 अशक्तस्तु वदन्नेवं,

व्यास., ६७४  
 मनु., ७४५  
 नार., ५६६  
 कात्या., ४३७  
 बृह., ३५६  
 मरीचि., ३५७  
 व्यास., ५०९  
 याज्ञ., ५७५  
 बृह., ३५६  
 कात्या., ३७८  
 नार., ६४०  
 ,, ६७०  
 मनु., ६८२  
 देव., ६६३  
 कात्या., ६६३  
 याज्ञ., ३१२  
 विष्णु., ३१२  
 कात्या., ३५९  
 व्यास., ६७९  
 कात्या., ४२३  
 नार., १८४  
 ,, ५७३  
 कात्या., १४५  
 मनु., ६११  
 कात्या., ३९२  
 मनु., ५५५  
 नार., ४१६  
 पिता., २०४  
 नार-प्रजा., ६८  
 बृह., ७१  
 ,, १८२  
 ,, १८१  
 कात्या., १०१  
 ,, ३१  
 नार., ४५९  
 याज्ञ., ४७७

अशक्तस्तूर्णमाशय,  
 अशक्तालसरोष्णार्त्ति,  
 ,,  
 अशक्तितो न दद्याच्चेत्,  
 अशक्तितो न दोषः स्यात्,  
 अशान्तलामे च ऋणे,  
 अशासंस्तस्करान् यत्,  
 अशासनान्तु पापानां  
 अशास्त्रविहितं यच्च,  
 अशिरांसि च दिव्यानि,  
 अशिराः पुरुषः कार्यो,  
 अशीतिभागं गृहीयात्,  
 अशीतिभागो वर्धेत,  
 अशीते तु विनाशं वै,  
 अशुद्धः कितवो नान्यत्,  
 अशुभं कर्म विज्ञेयं,  
 अशुभं दासकर्मोक्तं,  
 अशुल्कोपनतायांच,  
 अशुश्रूषकरीं चन्ध्यां,  
 अशुश्रूषाभ्युपेक्ष्यैव,  
 ,,  
 अश्मकृटास्तु दृश्यन्ते,  
 अश्मनोऽस्थीनि गोवालां,  
 अश्रेयान् श्रेयसीं जातिं,  
 अश्वमेधसहस्रं च,  
 अश्वमेधसहस्रादि  
 \*अश्वसारथ्यं,  
 अश्वहर्ता हस्तपादौ,  
 अष्टधा तु भवेत्कार्यं,  
 अष्टापाद्यं हि शूद्रव्यं,  
 अष्टमिर्मङ्गलैरेवं,  
 अष्टमं पाल इत्युक्तं,  
 अष्टमं मण्डलं गत्वा,  
 ,,  
 अष्टमावत्सरास्सिद्धिः,  
 \*अष्टशतं सीताद्रव्यापहारे च,

नार., ४१५  
 बृह., १९०  
 ,, ३५८  
 कात्या., ४५९  
 ,, ११  
 बृह., २९२  
 मनु., ५१२  
 कात्या., ७९६  
 बृह., ७७५  
 नार., २११  
 नार., ७८६  
 याज्ञ., २७९  
 बृह., २७९  
 कात्या., २०२  
 नार., ७६६  
 ,, ३८७  
 नार., ३८६  
 ,, ७४४  
 बौध्वा., ६१७  
 नार., ३८२  
 बृह., ,,  
 व्यास., ४४९  
 मनु., ४४०  
 ,, ८१५  
 विष्णु-नार., १२६  
 ,, ,, ,,  
 विष्णु., ८३१  
 व्यास., ५३१  
 महाभार., ६९८  
 मनु., ५५१  
 नार., ३२५  
 बृह., १९८  
 नार., २३१  
 पिता., ,,  
 नार., १०४  
 शा. लि., ५३४

अष्टाङ्गुलं भवेद्दीर्घं,	बृह.,	२५३	असहायेन मूढेन,	ममु.,	७९४
अष्टाङ्गोऽष्टदशपदः,	नार.,	४१	असाक्षिकहते चिह्नैः,	याज्ञ.,	४९६
*अष्टादशं क्षेत्रजाय,	हारी.,	७११	असाक्षिके चिरकृते,	बृह.,	१९३
अष्टादशपदो वादो,	बृह.,	४६	असाक्षिणस्ते वचनात्,	नार.,	१०८
अष्टादशसु मार्गेषु	मनु.,	७	असाक्षिणो यो निर्दिष्टा,	,,	११८
"	,,	७७०	*असाक्षिप्रणिहिते,	श. लि.,	१९७
अष्टाशीतिसहस्राणि,	यम.,	६३८	असाक्षिप्रत्ययास्त्वन्ये,	नार.,	१९५
अष्टौ तु त्रपुसंसेधु,	याज्ञ.,	५२४	असाक्षिप्रत्यया ह्येते,	,,	,,
असंतुष्टस्य कर्तव्यं,	कात्या.,	३१	असाक्षिमत्साक्षिमच्च,	,,	१५३
असंदिष्टं तु यत्कुर्यात्,	नार.,	३६०	असाक्ष्यपि हि शास्त्रेषु,	,,	१०८
असंबद्धकृतश्चैव,	मनु.,	२७१	असाधुजननं कूरं,	कात्या.,	७६२
असंभाव्यमसाध्यं तं,	बृह.,	४९	असाध्यं वा विरुद्धं वा,	बृह.,	४८
असंभाव्यस्तु कर्तव्यः,	नार.,	७८६	असिभिः शातयिष्यन्ति,	नार.,	१३४
असंभाष्ये साक्षिमिश्र,	मनु.,	७	असुतस्य प्रमीतस्य,	बृह.,	७४६
असंभोज्या असंयज्या,	,,	७८४	असुतास्तु पितुः पत्न्यः,	व्यास.,	६६४
असंभ्रान्तः शनैर्गच्छेत्,	नार.,	२३१	*अस्कन्नवेदयज्ञस्य,	श. लि.,	७४२
असंमोहार्थमार्याणां,	कात्या.,	७६३	अस्ति साक्षित्वमस्माकं,	बृह.,	१००
*असंसृष्टिविभाग,	गौत.,	७४८	अस्पृश्यः कामकारेण,	विष्णु.,	५६०
असंसृष्ट्यपि वाऽऽदद्यात्,	याज्ञ.,	७५७	अस्पृश्यधूर्तदासानां,	कात्या.,	४९९
असंस्कृता तु संस्कार्या,	याज्ञ.,	६७१	,,	,,	८००
*असंस्कृतामनतिसृष्टां,	बौधा.,	७२९	अस्मादकार्यसंसर्गात्,	कात्या.,	५८०
*असति पितरि चतुर्णां वर्णानां,	,,	६५७	अस्मारणं साक्षिणां च,	बृह.,	१८८
असत्प्रलापो हास्यं च,	व्यास.,	६२२	अस्मात्तैऽनुगमाभावात्,	कात्या.,	१७९
असत्यनिर्णये साक्षि,	बृह.,	३६	अस्यां यो जायते पुत्रः,	वसि.,	७२६
असत्यास्सत्यसंकाशा,	नार.,	१६	अस्वतन्त्रः स्मृतः शिष्यः,	नार.,	२७४
असत्सङ्गे विशेषेण,	बृह.,	६१९	अस्वतन्त्रकृताः सिद्धिं,	कात्या.,	२७२
असत्सु देवरेषु स्त्री,	नार.,	६४४	अस्वतन्त्रजडोन्मत्तः,	,,	६५
*असत्स्वप्नजेषु,	बौधा.,	७५१	*अस्वातन्त्राः पितृमन्तः,	श. लि.,	६५१
असद्व्ययात् पूर्वचौर्यात्,	नार.,	५४३	अस्वतन्त्राः प्रजाः सर्वाः,	नार.,	२७४
असन्दितानां सन्दाता,	मनु.,	५२९	अस्वतन्त्राः रित्रयः कार्याः,	मनु.,	६०१
असंभ्याकारिणश्चैव,	मनु.,	५०८	*अस्वतन्त्रा धर्मं स्त्री,	गौत.,	६१८
*असमप्रदाने लेख्यासन्निधाने,	विष्णु.,	३३६	अस्वतन्त्रेण मूढेन,	बृह.,	४३२
असमाहार्यमूलस्तु,	कात्या.,	३५४	अस्वर्ग्या लोकनाशाय,	कात्या.,	१८
असमीक्ष्य प्रणीतस्तु,	मनु.,	७९५	*अस्वातन्त्र्यं पतिशुश्रूषा,	देव.,	६२०
असवर्णं प्रसूतश्च,	कात्या.,	६६९	अस्वातन्त्र्यं मतस्तासां,	नार.,	६०२
असवर्णं स्वानुलोम्ये,	यम.,	५९८	अस्वामिकमदायादं,	,,	३६३



अस्वामिना कृतो यस्तु,  
 अस्वामिना तु यद्भुक्तं,  
 अस्वामिविक्रयं दानं,  
 अस्वाम्यं हि भवेत्तेषां,  
 अस्वाम्यं हि भवेत्तेषां,  
 अस्वाम्यनुमाताद्वासात्,  
 अस्वाम्यनुमतैनैव,  
 \*अस्वा हि पुरुषाः,  
 अहंपूर्विकया यातौ,  
 अहमुद्देशतो वच्मि,  
 अहश्च रात्रिश्च उमे च  
 अहश्च रात्रिश्च उमे च संध्ये,  
 अहिंसा सत्यमस्तेयं,  
 अहीनक्रमचिह्नं च,  
 अहोरात्रोषिते स्नाते,

मनुयमौ., ३५३  
 बृह., १८९  
 कात्या., ३५३  
 देव., ३९३  
 देव., ६४८  
 नार., ३५५  
 कात्या., ४५८  
 श.लि., ८००  
 बृह., ५८  
 ,, १९८  
 नार., २२१  
 पिता., २१९  
 मनु., ८३४  
 कात्या., १६१  
 नार., २१३

## आ

आकन्दे चाप्यपैहीति,  
 \*आकरशुद्धिश्च,  
 \*आकराधिपतयो हि,  
 \*आकरेभ्यः सर्वम्,  
 आकारकस्य सर्वत्र,  
 आकारणे रक्षणे च,  
 आकारच्छाद्यमानोऽपि,  
 आकारेज्जितचेष्टाभिः  
 आकारैरिङ्गितैर्गत्या,  
 आकाशबन्धमादध्यात्,  
 आकुलं च क्रियादानं,  
 आकुष्ठस्तु समाक्रोशन्,  
 आक्रोशकस्तु विप्राणां,  
 आक्रोशे ब्राह्मणस्य,  
 आक्षारयन् शतं दाप्य;  
 आगःसु च तथान्येषु,  
 आगःसु ब्राह्मणस्यैष,  
 आगस्तु शरग्राही,  
 आगन्तुकाः क्रमायाताः

मनु., ५०१  
 वसि., ७९३  
 ,, ७९३  
 विष्णु., ७९३  
 कात्या., ५७  
 बृह., २९  
 रामाय., ७८  
 कात्या., ७८  
 मनु., ७७  
 कात्या., ३०२  
 नार., ६१  
 बृह., ४९७  
 ,, ४७९  
 श. लि. ४७८  
 मनु., ४७७  
 विष्णु., ७७९  
 मनु., ७८५  
 पिता-नार., २३८  
 बृह., ३६६

आगमं चाप्यपां भिन्यात्,  
 आगमं निर्गमं स्थानम्,  
 आगमः प्रथमं कार्यो  
 आजमस्तु कृतो येन,  
 आगमानां विवदतां,  
 आगमेन विशुद्धेन,  
 आगमेनोपभोगेन,  
 ,,  
 आगमेऽपि बलं नैव,  
 आगमोऽभ्यधिको,  
 आगमसम्भवाद्गच्छेत्,  
 आगामिभद्रचपति,  
 आग्नेयं मण्डलं त्वाद्यं,  
 आघोषणं च मदगूनां,  
 आचतुर्थीतु तद्ग्राह्यम्,  
 आचतुर्दशकादहो,  
 आचारकरणे दिव्ये,  
 आचारहीनः पुनस्तु,  
 आचारेणावसन्नोऽपि;  
 आचार्यः शिक्षयेदेनम्,  
 आचार्यपत्नीं स्वयुतां,  
 अचार्यस्य पितुर्मातुः,  
 अचार्यस्य वसेदन्ते,  
 आजन्मनश्चामरणात्,  
 आज्ञालेखः पट्टकः  
 आज्ञासंपादनीं दक्षां,  
 आज्यं विना यथा तैलं,  
 आढ्यस्य निकटस्थस्य,  
 आत्मजाः परजाश्चैव,  
 आत्मशुद्धिपराणां च,  
 आत्मानं घातयेद्यस्तु,  
 आत्मानं दर्शयेद्यस्मै,  
 आत्मानमात्मना यास्तु,  
 आत्मा पुत्र इति प्रोक्तः,  
 आत्मार्थं विनियुक्तं वा,  
 आत्मार्थं किं न कुर्यात् स,

मनु., ५६६  
 ,, ५१६  
 नार., ४५  
 याज्ञ., १८२  
 बृह., ४६  
 नार., १८४  
 याज्ञ., ३५३  
 ,, ३५४  
 ,, १८५  
 ,, १८०  
 ,, ६४१  
 ,, १५८  
 बृह-पिता. २२४  
 यम., ८३१  
 कात्या., ६७२  
 ,, २५७  
 बृह., ८४  
 ,, ६६६  
 ,, ६९  
 नार., ३८४  
 याज्ञ., ५८७  
 कात्या., ७८०  
 नार., ३८४  
 बृह., १२४  
 नार., ५९  
 याज्ञ., ६१५  
 बृह., ७३५  
 ,, १७४  
 देव., ७१५  
 पिता., २११  
 अङ्गिरा, ८०५  
 मनु., ७३३  
 ,, ६०८  
 श.लि. ७२०  
 कात्या., ४२८  
 नार., १२८

आत्मा वै पुत्रचामासि,	श.लि.,	७२०	अभिमेकं द्वयोर्बन्ध,	”	३०१
”	बौधा.,	”	आधिरन्येऽथवा कार्यो,	नार.,	२९५
आत्मैव आत्मानः साक्षी,	मनु.,	१२५	आधिर्बन्धः समाख्यातः,	बृह.,	२९२
*आत्रेय्या वधः क्षत्रियवधेन,	बौधा.,	५७२	आधिश्चोपनिधिश्चौभौ,	मनु.,	१८७
आददानस्तु तल्लोभात्,	मनु.,	७८७	आधिस्तु द्विविधः प्रोक्तो,	व्यास.,	३००
आददानो ददच्चैव	मनु.,	४३०	आधिस्तु भुज्यते तावत्,	याज्ञ.,	२८५
आददीताथ षड्भागं,	”	५५५	”	”	३११
आददीथमेवं तु.	कात्या.,	३२४	आधेःस्वीकरणात्सिद्धिः,	”	३००
आद्याद्वाङ्मणीं यस्तु,	”	३९८	आधौ प्रतिग्रहे क्रीते,	याज्ञ.,	७७१
अदद्यात्तत्कथं न स्यात्,	”	३०९	आध्यादीनपि जीर्यन्ति,	नार.,	१८६
आदानं प्राप्य तस्यां तु,	”	१५९	आध्यादीनां निहन्तारं,	याज्ञ.,	१९१
आदानकालादारभ्य,	”	१७९	*आध्युपभोगे वृद्धयभावः,	विष्णु.,	२९४
आदाने वा विसर्गे वा,	हारी.,	२७५	आनन्तर्यात्स्वयोन्यां च,	मनु-विष्णु.,	८२१
”	कात्या.,	६८६	आनीते मध्यमे चापे,	बृह.,	२३८
आदाथ दापयेच्छ्राद्धम्,	बृह.,	७४६	आनुलोम्येन तत्रैको,	नार.,	८१६
आदिष्यचन्द्रावनिलानलौ च,	नार.,	२२२	आनुलोम्येन वर्णत्वं,	यम.,	८२३
”	पिता.,	२१९	”	नार.,	८१६
आदौ तु कारणं दानं,	नार.,	१७९	आनुलोम्येन वर्णानां	”	८१६
आदौ मध्येऽवसाने वा,	”	४००	आतृष्यं कर्मणा गच्छेत्,	मनु.,	८०२
आद्यमद्योत्तमानं दण्डान्,	व्यास.,	४८२	आपद्भामात्तथा वर्षात्,	नार.,	१०४
आधौ तु विसर्गे दाप्यौ,	बृह.,	३०४	आपत्कालकृता नित्यं,	कात्या.,	२८३
आधत्त पितरौ गर्भं,	श.लि.,	७२०	आपत्काले तु कर्तव्यं,	”	३७५
आधर्यं पूर्वपक्षस्य,	नार.,	८८	आपत्कृतादते पुंसः,	नार.,	३१७
आधाता यत्र न स्यात्,	कात्या.,	३००	आपत्स्वपि न देयानि,	दक्ष.,	३७४
आधानं विक्रयं चापि,	याज्ञ.,	५२२	आपत्स्वपि हि कष्टासु,	नार.,	३७४
आधानं विक्रयो दानं,	कात्या.,	३०१	आपद्गतस्तथा वृद्धो,	मनु.,	४५५
आधानमुपरुद्धो वा,	”	१७६	आपद्गतोऽभ्युपगतो,	यम.,	७१८
आधानसहितं यत्र,	”	१७१	आप्रस्त्रिभागहीने तु,	कात्या.,	२०२
आधानभूतः प्रक्षेपः,	नार.,	३५८	आप्तभावेन तद्रक्ष्यं,	नार.,	४०२
आधिः प्रणश्ये द्विगुणे,	याज्ञ.,	२९७	आप्ताः शिष्टा विबुद्धा ये,	कात्या.,	१०६
आधिः साहसमाक्रम्य,	नार.,	५०६	आभीरोऽम्बष्ठकन्यायां,	मनु-विष्णु.,	८२०
”	”	५५६	आभीषणेन दण्डेन,	कात्या.,	४९७
आधिः सीमा बालधनं,	मनु.,	१९०	आमन्त्रिता च नागच्छेत्,	बृह.,	४०८
आधिक्यं न्यूनता ह्यंशे,	कात्या.,	४३८	आमन्त्रितो द्विजो यस्तु,	सहस्रपु.,	५६२
अधिभोगस्तृक्षो यो,	याज्ञो.,	२८५	आमन्त्र्य पूजयेन्मन्त्रैः,	बृह.,	२५४
आधिमन्यं स कार्यः स्यात्,	कात्या.,	२९५	आमनाये स्मृतिज्ञाने च,	”	७४३

आयव्ययज्ञैः शुचिभिः,	बृह.,	३५८	आसंस्काराद्धरेद्भागं,	शङ्ख,	७५६
आवव्ययेऽथैस्कारे	,,	६०८	*आसनशयनवाक्पथिषु,	गौत.,	४९२
आयसं द्वादशफलं,	,,	२५३	आसन्नसैनिकः संख्ये,	बृह.,	५४
आयसं लेलिहानस्य,	पिता.,	२२९	आसां भोगं न दोषः स्यात्,	कात्या.,	६४७
आयुधीयोत्तमस्तेषां,	बृह.,	३८६	आसाधये द्विवादार्थी,	नार.,	५९
आयुधैश्च प्रहरणं,	,,	४८५	आसामन्यतमां गत्वा,	नार.,	५८७
आयुर्वीजहरी राज्ञां,	कात्या.,	१८	आसिद्धिस्तं परासेधं,	,,	५३
आयुर्हरति सा भर्तुः,	विष्णु.,	६२८	आसीतामरणात्,	मनु.,	६३७
आयुष्कामेन वप्तव्यं,	मनु.,	७३७	आसीनः प्राङ्मुखो,	कात्या.,	९
*आयोगवानामवस्करणं,	श. लि.,	८३०	आसेधयंस्त्वनासेध्यं,	,,	५३
आरभ्यकृत्सहायश्च,	बृह.,	५७३	,,	बृह.,	३३९
,,	कात्या.,	५८४	आसेधयेतां यदि वै,	कात्या.,	५४
आरम्भात्संग्रहं यावत्,	,,	५५	आसेधयेदनासेधैः	,,	५३
आरम्भास्ते तु निर्दिष्टाः	,,	५८०	आसेधयोग्य आसिद्ध,	,,	५३
आरम्भे प्रथमं दद्यात्,	,,	७९७	आस्वेव तु भुजिष्यासु,	नार.,	५९८
आरामायतनग्रामं,	याज्ञ.,	४५२	आहरेन्मूलमेवासौ,	कात्या.,	३५९
आरुह्य संशयं यत्र,	कात्या.,	६७८	आहर्ता भुक्तियुक्तोऽपि,	,,	९६५
आरूढपतिताज्जातो,	यम,	८२७	आहर्ता लभते तन्तु,	विष्णु-कात्या.,	१७७
आर्तस्तु कुर्यात्स्वस्थः,	मनु.,	४०४	आहर्ता शोधयेद्भुक्तिं,	बृह.,	१८३
आर्तार्ते मुदिते दृष्टा,	बृह.,	६३०	आहरकाले रात्रौ च,	कात्या.,	३२५
आर्द्रवासाः शुचिश्चैव,	हारी.,	२२६	*आहरमयं शरीरं,	श. लि.,	६३०
आर्यरूपमिवानार्थं,	मनु.,	८२८	आहार्यं वर्जयेत्तोयं,	पिता.,	२३६
*आर्यस्त्रयभिगमनलिङ्गोद्धारः,	गौत.,	५९०	आहिण्डिको निषादेन,	मनु-विष्णु.,	८२२
आर्हतसौगतांतां तु,	कात्या.,	८९०	*आहिताग्निश्चेत् प्रमीयेत,	हारी.,	६३५
आवन्त्यवाटधानौ च,	मनु.,	८२६	आहितोऽपि धनं दत्वा,	नार.,	३९९
आवहेयुर्भयं घोरं,	नार.,	४२४	आहतः प्रपलायेत,	बृह.,	८३
आवाहनं च देवानां,	पिता.,	२९९	आहूतस्त्ववमन्येत,	कात्या.,	५६
आवाहनं तु देवानां,	,,	२२८	आहूतो यः पलायेत,	नार.,	८२
आविद्याग्रहणाच्छिष्यः,	नार.,	३८३	आहूतो यस्तु नागच्छेत्,	बृह.,	१४४
आवेदयति चेद्वाज्ञे,	याज्ञ.,	४५	आहूय प्रपलायी च,	नार.,	४८९
आवेद्य तु घृपे कार्यं,	कात्या.,	५२	आहूय यः कृतः साक्षी,	बृह.,	१००
आवेष्टनं चांशुकायैः,	व्यास.,	४८५	आहूय साक्षिणः पृच्छेत्,	नार.,	१२३
आशुद्धेः संप्रतीक्ष्यो हि,	याज्ञ.,	६२८	आहत्य परतन्त्रार्थं,	कात्या.,	७७४
आश्रमेषु द्विजातीनां,	मनु.,	३२	आहत्य स्त्रीधनं तत्र,	,,	३२२
आश्रयः शस्त्रदाता च,	कात्या.,	५७४	आहत्य स्थापयेत्तत्र,	बृह.,	४९९
आसंवत्सरात् सिद्धिं तु,	नार.,	१०४	आहैकोहं दर्शयामि,	,,	३०४

आह्वयकादेशकराः,	नार.,	५४९	इह कीर्तिं राजपूजां,	बृह.,	३३
इच्छतः श्रद्धानस्य,	नार.,	२४५	इह कीर्तिमवाप्नोति,	मनु.,	६२९
इच्छतः स्वामिनश्चाङ्गैः,	नार.,	३८७	”	याज्ञ.,	६२९
इच्छन्ति पितरः पुत्रान्,	नार.,	३१३	इह चानुत्तमां कीर्तिं,	मनु.,	१२५
इच्छन्त्यामागतायां च,	व्यास.,	५८८	इह यास्यस्यभव्यासु,	नार.,	१३४
इतरा तु धनं वित्तं,	दक्ष.,	६०६	इहैव तस्य देवत्वं,	”	१२८
*इतरानौरसाय,	हारी.,	७११	”	बृह.,	३४
इतरे कृतवन्तस्तु,	मनु.,	७८५	इहैव सा चरति क्षीणपुण्या,	वसि.,	६३१
इतरेण निधौ लब्धे,	याज्ञ.,	७९२	इहैव सा तिष्ठति हीनपुण्या,	यम.,	६३१
इतरेषां तु देवानां,	पिता.,	२४६	इहैव सा शुनी गृध्री,	याज्ञ.,	६३१
इतरेषां तु वर्णानां,	मनु.,	५८८	इ		
*इतरेषां वर्णानां,	आप.,	७७८	ईदृशं सिद्धिमाप्नोति,	कात्या.,	१६९
इतरोप्यभियुक्तेन,	कात्या.,	७८५	ईदृशीं त्वनुरूपेण,	”	६४७
इति संविन्त्य नृपतिः,	याज्ञ.,	७९६	ईष्यास्यासमुत्थे तु,	नार.,	५१
इत्युक्त्वा साक्ष्यमर्हन्ति,	मनु.,	१०५	ईशः सर्वस्य जगतो,	मनु.,	७८७
इत्युक्त्वा हस्तयोगस्तस्य,	नार.,	२३०	ईशो दण्डस्य वरुणो,	”	”
*इत्येते दायादा,	वसि.,	७१३	उ		
इत्येते शपथाः प्रोक्ताः,	नार.,	२५६	उक्तं तुष्टिकरं यत्तु,	कात्या.,	३१६
इत्येते संकरोत्पन्नाः,	यम.,	७१४	उक्ता पञ्चगुणा शाके,	बृह.,	२८९
इत्येवमादयो ज्ञेयाः,	नार.,	५०८	उक्तान्येतानि दिव्यानि,	नार.,	१९७
इन्द्रस्थानेऽभिशस्तानां,	कात्या.,	२११	उक्ता वाचो विब्रवंश्च,	”	८२
इन्द्रस्थाने सभायां च,	पिता.,	२१५	उक्तेऽपि साक्षिभिः साक्ष्ये,	याज्ञ.,	१४९
*इन्द्रनोदकामि,	श.लि.,	८०४	उक्तेऽर्थे साक्षिणो यस्तु,	कात्या.,	१२२
इमं मन्त्रविधिं कुरुस्व,	पिता.,	२१९	उक्तेषु साक्षिणो राज्ञा,	”	१३७
इमं हि सर्ववर्णानां,	मनु.,	६०३	उक्तो नियोगो मनुना,	बृह.,	६४३
इमानप्यनुयुञ्जीत,	”	४४४	उक्त्वाऽनृतं महाघोरं,	नार.,	१३३
इवपदेनाङ्कयित्वा तं,	दक्ष.,	३९०	उक्त्वाऽन्यथा ब्रुवाणाश्च,	कात्या.,	१४१
इषवस्तस्य नश्यन्ति,	नार.,	४५८	उग्रः पारशवश्चैव,	नार.,	८१५
इषूज प्रक्षिपेद्विद्वान्,	पिता.,	२३४	*उग्राज्जातः,	बौधा.,	८१८
इष्टं स्यात् क्रतुमिस्तेन,	याज्ञ.,	७९५	* उग्राणां कुञ्जर,	श. लि.,	८३०
इष्टकाङ्गारसिकताः,	व्यास.,	४४९	*उग्राद्वितीयायां,	बौधा	८२०
इष्टकाभस्मपाषाण,	पिता.,	२१७	उग्रान्देवान्समभ्यर्च्य,	विष्णु.,	२४६
इष्टकोपलकाष्ठैस्तु,	बृह.,	४८८	उग्रानिषायामुत्पन्नः,	देव.,	८२०
*इष्टापूर्तप्रदानं अन्यांश्च.	श.लि.,	२५६	*उग्रायां त्वाचैः,	पैठी.,	८१९

*उप्रेणाद्यासु.,	८१९	उत्तरौ च विसंवादे,	३०४
उच्छेद्याः सर्व एवैते,	कात्या., ४२५	उत्पत्तिजातिसंज्ञां च,	कात्या., १५६
उज्जामपत्रं तत्प्रोक्तं,	बृह., १५४	उत्पद्यते गृहे यस्य,	मनु., ७३०
उज्जाममुदयादानात्,	१६७	उत्पन्नसाहसाऽन्यस्मै,	नार., ३१९
उज्जामादिकमादाय,	३१४	उत्पन्ने त्वौरसे पुत्रे,	६४५
उत्कर्षं चापकर्षं च,	मनु., ८२४	उत्पन्ने स्वामिने भोगः,	कात्या., ७१०
उत्कर्षं योषितश्चासाः,	६०९	उत्पादनमपत्यस्य,	७१३
उत्कर्षापकर्षात्,	उशना., ८१४	उत्पादयति यो हिंसां,	याज्ञ., ४५७
*उत्कर्षापकर्षाद्वर्णाः	३२	उत्पादयेत्पुनर्भूत्वा,	मनु., ६०९
उत्कृत्य लिङ्गवृषणौ,	कात्या., ५८५	उत्पादिता भवेयुस्ते,	कात्या., ५२
उत्कुष्ठजातिशीलानां,	मनु., ५०८	उत्सेवकः सन्धिमेत्ता,	मनु., ७२८
उत्कोचकाः सोपाधिकाः	नार., ५२१	उदकं चैव दाराश्च,	देवल., ८२७
उत्कोचजीवीनो द्रव्य,	याज्ञ., ५६८	उदकं च प्रदातव्यम्,	व्यास., ५१०
उत्क्रम्य तु वृत्ति यः,	४६३	उदङ्मुखः प्राङ्मुखो वा,	कात्या., ६८०
उत्क्षेपकप्रन्थिभेदौ,	याज्ञ., ५३१	उदङ्मुखान् प्राङ्मुखान्वा.,	पितामह., २१७
उत्क्षेपकाः सस्यहरा,	व्यास., ५०९	उदरस्थो हि भूतानां,	२४२
उत्तमं चेति शालेषु,	बृह., ५५६	उदितः स्यात् स तेनैव,	मनु., १२४
*उत्तमर्णश्चेद्राजानमियात्,	विष्णु., ३३४	उदितोऽयं विरतरेण,	पिता., २२८
उत्तमर्णाधमर्णाभ्यां,	नार., ३१३	उदित्युचा च वारुण्या,	कात्या., ६८०
उत्तमर्णाधमर्णौभ्यः,	बृह., ६६६	उदुद्यते दाक्षिणात्यैः,	मनु., ७७०
उत्तमश्चास्थिभेदेतु.	४८८	उद्गूरणे तु हस्तस्य,	मनु., १४७
उत्तमश्चेति शालेषु,	व्यास., ६७७	उद्गूर्णे प्रथमो दण्डः,	बृह., २१
*उत्तमसाहसं दण्डनीयो,	विष्णु., ५२०	उद्गूर्णे हस्तपादे तु,	कात्या., ४८६
उत्तमस्त्वायुधीयोऽत्र.,	बृह., ३८६	उद्धरन्ति ततो यस्मात्,	याज्ञ., ४९०
उत्तमां सेवमानस्तु,	मनु., ५९५	उद्धरेल्लेख्यमाहर्ता,	४८७
उत्तमाधममध्यानां,	बृह., ३१	उद्धारं ज्यायसे दत्त्वा,	कात्या., ४४८
उत्तमायां वधस्त्वेव,	नार., ५९६	उद्धारेऽनुद्धृते तेषां,	बृह., १६५
उत्तमस्याधिकः प्रोक्तो,	बृह., ४७४	उद्धारो न दशस्वस्ति,	मनु., ७००
उत्तमेषु तु सर्वेषु,	कात्या., ९६	उद्धृत्य कूपवाप्यम्भ,	६६०
उत्तमेभ्यस्त्रयस्त्रिभ्यः,	नार., ८१५	उद्धृत्यान्यस्तु कार्यः स्यात्,	६५९
उत्तरं तत्र तज्ज्ञेयं,	व्यास., ७०	उद्यतेऽश्मशिलाकाष्ठे,	बृह., ६८१
उत्तरान्तर्गतं चापि,	कात्या., ७३	उद्युक्तः कर्षकः सस्ये,	वृह., ४८७
उत्तरे मद्यपा नार्यः,	बृह., २१	*उद्गततः कीनाशस्य,	कात्या., ५५
उत्तरोत्तरबन्धेन,	७७२	*उद्गाततः कीनाशस्य,	आप., ४१४

उद्वाहकारिणं,  
उद्विजेत तदैवास्याः,  
उद्वेजनकरैर्दण्डैः,  
उन्मत्तं पतितं क्लीबं,  
उन्मत्तक्रुद्धलुब्धार्ता,  
उन्मत्तजडबालानां,  
उन्मत्तजडमूकास्तु,  
उन्मत्तमत्तनिधूता,  
उन्मत्तार्ताः साहसिका,  
उपकारक्रिया केलिः,  
उपक्षया विनश्यन्ति,  
उपघातेषु मध्यस्थान्,  
उपचर्यः स्त्रिया साध्या,  
उपचारस्तथैवास्थ,  
उपच्छन्नानि चान्यानि,  
उपजीव्यदुमाणां तु,  
उपजीव्य धनं मुञ्चन्,  
उपधामिस्तु यः कश्चित्,  
\*उपधिदेविनां कर,  
उपधौ कूटसाक्ष्ये च,  
उपन्यस्ते च यल्लब्धं,  
उपपन्नो गुणैः सर्वैः,  
उपपातकयुक्ते तु,  
उपप्लवनिमित्तं च,  
उपर्युपरि बुद्धीनां,  
उपलब्धिक्रियालब्धं,  
उपलब्धे लभेरस्ते,  
उपश्रवणसंभोग,  
उपसर्जनं प्रधानस्य,  
उपस्थमुदरं जिह्वा,  
उपस्थितस्य मोक्तव्य,  
उपस्थिताः परीक्ष्याः स्युः,  
उपस्थितान् परीक्षित,  
उपहृन्येत वा पुण्यं,  
उप्रांशु येन विकृतं,  
उपानयेदरण्याय,  
उपास्यश्चोद्यमानस्तु,

वसि., ७९३  
महाभा., ६२१  
मनु., ५८४  
,, ६१५  
बृह., २९  
,, १७४  
मनु., ६६६  
बृह., ७३  
,, ११२  
नार., मनु., ५७९  
बृह., ३००  
मनु., ५५०  
,, ६२७  
नार., २९२  
मनु., ४४०  
याज्ञ., ५०३  
,, ५६४  
मनु., ३४५  
विष्णु., ७६८  
कात्या., ६७  
कात्या., ६७७  
मनु., ७३१  
याज्ञ., ४८२  
कात्या., ३१४  
बृह., ३१  
कात्या., ३७८  
,, ५४७  
,, ४४८  
मनु., ७०९  
,, ७८२  
याज्ञ., २९६  
बृह., १३८  
कात्या., १३८  
नार., ४३१  
बृह., ३५०  
नार., ४१४  
बृह., ४३

उपायैः शास्त्रविहितैः,  
उपायैः साममेदायैः  
उपायैर्विविधैरेषां,  
उपेक्षकोऽनियुक्तश्च,  
उपेक्षिता यथा धेनुः,  
उपोषितं तथा स्नानं,  
,,  
उभयानुमतः साक्षी,  
उभयाभ्यर्चितेनैतान्,  
उभयोः प्रतिभूमाद्यः  
उभयोः समतः साधुः,  
उभयोरपि संदिग्धौ,  
उभयोरप्यसाध्यं चेत्,  
उभयोरप्यसौ रिकथी,  
उभयोलिखिते वाक्ये,  
उभाभ्यां यस्य विश्वस्तं,  
उभावपि त्वसंस्कार्यौ,  
उभौ चार्थानुसारेण,  
उभौ तौ नार्हन्तौ भागं,  
उभौ वा श्रोत्रियौ ख्यातौ,  
उल्काभिदायकाश्चौराः,  
\*उल्काहस्तोऽभिदः  
उल्काहस्तोऽभिदो ज्ञेयः,

नार., ७७५  
बृह., ७७५  
नार., ५०६  
कात्या., ५७४  
व्यास., १८५  
कालिकापुरा., २२१  
विष्णु., २२०  
याज्ञ., १०३  
याज्ञ., १५५  
,, ५७  
बृह., १००  
,, ७६९  
याज्ञ., ४०१  
,, ७२१  
कात्या., ७३  
बृह., का., १००  
मनु., ८२४  
बृह., ७७२  
मनु., ७४३  
बृह., १०२  
यम., ५६७  
श. लि., ५९५  
नार., १९५

ऊ

ऊढया कन्यया वापि,  
ऊढया कन्यया वापि  
ऊनं वाप्यधिकं वापि,  
ऊनाधिकं पूर्वपक्षं,  
ऊर्ध्वं पितुश्च मातुश्च,  
ऊर्ध्वं यस्य द्विसप्ताहान्,  
ऊर्ध्वं मासत्रयात्तस्य,  
ऊर्ध्वं लब्धं तु यत्किञ्चित्,  
ऊर्ध्वं विभागाज्जातस्तु,  
ऊर्ध्वं संवत्सरादेनां,  
ऊषरं मूषिकव्याप्तं,

कात्या., ६८४  
,, ६७५  
याज्ञ., ५७०  
बृह., ६२  
मनु., ६४८  
नार., २८८  
कात्या., २८६  
,, ६९४  
मनु., नार., ७०५  
मनु., ६१५  
बृह., ३६९

## ऋ

ऋक्थं प्रीतिदत्तं तु ,	कात्या , ६७२
ऋक्थं मृतायाः कन्याया ,	बौध्वा. मनु. , ६९२
ऋक्थग्राह ऋणं दाप्यो ,	याज्ञ , ३२१
*ऋक्थमूलं हि कुटुम्बम्	श. लि. , ६५१
ऋक्थमिवा परैर्द्रव्यं ,	बृह , १८८
ऋग्वेदवादान् साध्वी स्त्री ,	ब्रह्मपुरा. , ६३४
ऋज्वी घटतुला कार्या ,	नार. , २१५
ऋणं तद्धर्मसंयुक्तं ,	हारी. , ३७७
ऋणं तयोः पतिकृतं ,	नार. , ३१९
ऋणं तु दापयेत्पुत्रं ,	कात्या , ३२१
ऋणं तु सोदयं दत्वा ,	नार. , ३९
ऋणं दमं च दाप्यः स्यात् ,	बृह. , १४४
ऋणं दद्यात्पतिस्तासां ,	याज्ञ. , ३१७
ऋणं दद्यात्पितृव्ये वा ,	नार. , ३११
ऋणं दातुमशक्तो यः ,	मनु. , ३१८
ऋणं देयमदेयं च ,	नार. , २७७
ऋणं देये प्रतिज्ञाते ,	मनु , ३३३
ऋणं पुत्रकृतं पित्रा ,	कात्या. , ३१५
ऋणं पैतामहं पौत्रः ,	व्यास , ३०६
ऋणं लेख्यं गृहं क्षेत्रं ,	बृह. , ७०७
ऋणं लेख्यं साक्षिणो वा ,	कात्या. , ९२
ऋणं लेख्यकृतं देयं ,	याज्ञ. , ३११
ऋणं वोढुः स भजते ,	नार. , ३१९
ऋणं सलाभं संशोध्य ,	व्यास. , २९४
*ऋणमस्मिन् सन्नयति	विष्णु वसि. , ७४२
ऋणमात्मीयवत्पितृव्यं ,	बृह. , ३१०
ऋणमेवंविधं देयं ,	कात्या. , ३१८
ऋणमेवंविधं पुत्रान् ,	” , ३११
ऋणमेवंविधं शोधयं ,	” , ६७३
ऋणात्पिता मोचनीयो ,	नार. , ३१३
ऋणादानं प्रयोगादि ,	बृह , ३७७
ऋणादानादिकार्येषु ,	” , १९९
ऋणादिकेषु कार्येषु ,	” , ७७२
” ,	” , ९३
ऋणादिषु परीक्षत ,	कात्या. , ११८

## ऋणानां सावर्भौमोऽयं

ऋणानुरूपं परतो ,  
ऋणार्थमाहरेत्तनु ,  
ऋणिकः सधनो यस्तु. ,

”

ऋणिकेन तु या बुद्धिः ,  
ऋणिको दाप्यते यत्र. ,  
ऋणिसाक्षिलेखकानां ,

”

ऋषि स्वहस्तसन्देहे ,  
ऋणे धने च सर्वस्मिन् ,  
ऋतुत्रयस्योपरिष्ठात् ,  
ऋतुस्नाता तु या नारी ,  
ऋतौ तु तस्यां स्नातायां ,  
ऋत्विक् च त्रिविधो दृष्टः ,  
ऋत्विक्पुरोहितामात्य ,  
ऋत्विग्यदि वृत्ते यज्ञे ,  
ऋत्विग्याज्यमदुष्टं यः ,  
ऋत्विग्वादे नियुक्तश्च ,  
ऋत्विङ्न्यायेन यज्ञबन्धं ,  
ऋत्विजं यस्त्यजेद्याज्यो ,  
ऋत्विजां व्यसनेऽप्येवं ,  
\*ऋषभोऽधिको जेष्ठस्य ,  
\* ,

\*ऋषभोऽधिको ज्येष्ठाय ,

## ए

एकं भवेद्विभक्तानां ,  
एकं वृषभमुद्धारं ,  
एकं शास्त्रमधीयानो ,  
एकं शूद्रः ,  
एक एव प्रमाणं स .  
एक एव प्रमाणं स्यात् ,  
एक एव सवर्णः स्यात् ,  
एक एव सुहृदमो ,  
एक एवौरसः पुत्रः ,

नार. , २८५

बृह. , ३२९

कात्या , ३२२

नार. , ३३४

यम. , ”

कात्या. , २८३

बृह. , ३२५

” , १६६

” , १५५

कात्या. , १६८

मनु. , ६९५

कात्या , २८७

यम. , ६१७

यम. , ६४०

नार. , ३६८

याज्ञ. , ७८०

मनु. , ३६४

नार. , ३६८

बृह , ७६

कात्या. , ६७७

मनु. , ३६८

नार. , ३६३

गौत. , ६५९

श.लि. , ७१२

” , ६५९

बृह. , ६५१

मनु. , ६५८

कात्या. , २८

विष्णु. , ७००

कात्या. , १०३

बृह. , १०२

देव. , ६६३

मनु. , ३७

बृह. मनु. , ७०८

एकक्रियानिवन्धेन,	कात्या.,	३०१	एकैकं तु त्रिधा मित्रं,	बृह.,	४७२
एकच्छायाकृतं सर्वं,	बृह.,	३१२	एकैकं वादयेत्तत्र,	कात्या.,	१३७
एकच्छायाश्रितेष्वेषु,	याज्ञ.,	३०७	एकैकः पुनरेतेषां,	बृह.,	३८२
एकजातिर्द्विजातिस्तु,	मनु., नार.,	४८०	*एकैकमितरेषाम्.	श.लि.,	७१२
एकत्र कूलपातं तु,	बृह.,	४५१	एकैकानेकधा मित्रा,	बृह.,	९१
एकत्र शिष्ये पुरुषं,	नार.,	२१६	एकैको द्विविधः,	प्रोक्तः.,	२५८
एकदेशोपभोगेऽपि	बृह.,	१८१	एकैव हि भवेद्द्वार्या,	महाभार.,	६९८
एकद्वित्रिचतुर्भागान्,	कात्या.,	३७१	*एकोनविंशं	हारी,	७११
*एकधनेन ज्येष्ठं तोषयित्वा,	आप.,	६५५	एको लुब्धस्तु साक्षी स्यात्,	मनु.,	११८
एकपाकेन वसतां,	बृह.,	६५१	*एकोऽश्नीयादुत्पन्नं,	विष्णु.,	३०१
एकपात्रेऽथ पङ्क्त्यां वा,	कात्या.,	४२६	एकोऽहमस्मीत्यात्मानं,	मनु.,	१३१
एकमेवाद्वितीयं तत्,	नार.,	१२७	एकोह्यनीशः सर्वतः,	बृह.,	७६०
एकयोनय एवाद्याः,	यम.,	८१७	”	”	३७६
एकरूपा द्विरूपा वा,	कात्या.,	७६५	एतं सामासिकं धर्मं,	मनु.,	८३४
एकवासा घृताक्ताज्ञो,	यम.,	६४०	एतत्तु कर्तरि धनं	नार.,	१८४
एकव्रतस्कन्धभावात्,	हारी,	६०२	एतत्संग्रहणं प्रोक्तं,	बृह.,	५७८
एकशय्यासनं क्रीडा,	बृह.,	५७८	”	”	६०१
एकश्चेदुजयेत्सीमां,	नार.,	४४५	एतत्सर्वं प्रदातव्यं,	कात्या.,	३१५
एकस्थानासनाहारः,	कात्या.,	५८०	एतद्दशान्नं करणं,	बृह.,	२७
एकस्थाली सहायारि,	नार.,	१०९	एतद्यथाक्षरं लेख्ये,	कात्या.,	१६०
एकस्य चेत्स्याद्व्यसनं,	”	३६१	एतद्वयं समाख्यातं,	बृह.,	३५६
एकस्य बहवो यत्र	बृह.,	५७२	एतद्विधाधनं प्रादुः,	कात्या.,	६७७
एकस्य बहुमिस्सार्धं,	बृह.ना.,	५०	एतद्विधानमाख्यातं,	बृह.,	१७७
एकस्यापि सुते जाते,	बृह.,	७४०	एतद्विधानमातिष्ठेत्,	मनु.,	४१८
एकस्मिन् तोलयेन्मर्यं,	पिता.,	२१७	एतद्विभागं विज्ञेयं,	मनु.,	६९६
एकस्मिन् यत्र दृश्येते,	बृह-यम.,	६८१	एतांश्चारैः सुविदितान्,	बृह.,	७७५
एकां स्त्रीं कारयेत्कर्म,	बृह.,	६८१	एतानाहुः कूटसाक्ष्ये,	मनु.,	१४१
एका चेत्पुत्रिणी तासां,	”	७४१	एतान् दशापराधांस्तु.,	बृह.,	७७५
एकादशगुणं दाप्यो,	मनु.,	४२७	एतान् दोषानवेक्षस्व,	मनु.,	१३३
एकादश पृथग्गोत्राः,	ब्रह्मपुरा.,	७३७	एतान्येव प्रमाणानि,	नार.,	२७३
”	”	७३६	एतावानेव पुरुषो,	मनु.,	७३८
एकादशविधः साक्षी,	नार.,	९८	एताश्चान्याश्चलोकेऽस्मिन्,	मनु.,	६०९
एकाधिकं हरेज्ज्येष्ठः	मनु.,	६६१	एतासां यान्यपत्यानि,	हारी.,	६४६
एकान्तरस्तु दौष्यन्तो,	नार.,	८१६	एते कर्मकरा ज्ञेया,	नार.,	३८३;
एकाहव्यहपञ्चाह,	बृह.,	६४	एते तु शपथाः प्रोक्ताः,	बृह.,	२५६
एकाहद्वयहापेक्ष्यं,	कात्या.,	५७	एते द्वादशपुत्रास्तु,	देव.,	७१५
एकाहे लिखितं यच्च,	”	३३५	एतेनैव प्रकारेण	नार.,	५५७



एतेऽप्यनभिसम्बन्धः,	उशना., ११८	एवं पृष्टः स यद्ब्रूयान्,	कात्या., ५१
एते राष्ट्रे वर्तमानाः,	मनु., ५२७	एवं प्रत्यर्थिनोक्तं तु,	,, १६८
एते षट् सदृशान् वर्णान्,	मनु-विष्णु. ८२१	*एवं बहूनां निम्नतां	विष्णु., ४९२
एतेषां निग्रहो राज्ञः,	मनु., ६००	एवं योनिरिव बलवती,	श.लि., ६०७
*एतेषां पूर्वः पूर्वः	विष्णु., ७१६	*एवं वर्णभेदः,	,, ८२९
एतेषां समवेतानां,	बृह., ५०	एवं वादिकृतान् वादान्,	बृह., ७६९
एतेषामपराधे तु,	कात्या., ७८०	एवं विदित्वा तत्साक्षी,	,, १२६
एतेष्वेव यदा देयः,	,, २६६	एवंविधस्तु यो भोगः,	,, १७७
एतेष्वेवाभियोगे तु,	,, ११७	एवंविधानि कालानि,	नार., २१४
एतेष्वेवाभियोगेषु,	,, २०८	एवं विधान्नुपो देशान्,	मनु., ५४६
एते सनाभयस्तृक्ताः,	,, ११३	एवं शास्त्रोदितं राजा,	बृह., १७
एते सर्वे पृथग्ज्ञेयाः,	मनु., ७८४	एवं स बन्धनात्तस्मात्,	नार., १२७
एते साधरणा मासाः,	पिता, २०३	एवं समुद्भूतोद्वारे,	मनु., ६६०
*एते हि धर्मप्रतिकरा.	शं-लि., ७८०	एवं सह वसेयुर्वा,	मनु., ६५१
एतैः समापराधानां,	कात्या., ८०२	एवं स्वभावं ज्ञात्वासां,	,, ६०५
एतैरुपाययोगैस्तु,	मनु., ६०८	एवं हि विनयः प्रोक्तो,	नार., ४६७
एतैरेव नियुक्तानां,	कात्या., २०८	एवमन्येऽपि विज्ञेयाः,	नार., ७१९
एतैर्लिङ्गैर्नयेत्सीमां,	मनु., ४४१	एवमादीन्विजानीयात्,	मनु., ५०९
एतश्च श्रावयित्वा,	नार., २४६	एवमुक्त्वा विषं शाङ्गं,	याज्ञ., २४३
एनो गच्छति कर्तारं,	मनु., ३५	एष एव विधिज्ञेयो,	,, ४५२
एमिरेवगुणैर्युक्ता	दक्ष., ६१४	,,	,, ७६३
एमिश्च व्यवहर्ता यः,	याज्ञ., ५१५	एष एव विधिर्दृष्टः,	नार., ९५
एमिश्चिह्नैः सदा ज्ञेयाः,	कात्या., ५८०	,,	,, ३४७
एमिस्तूत्कृष्टमूल्यानां,	नार., ५३३	एष एवोदितो धर्मो,	बृह., ३४७
एवं कार्याणि सर्वाणि,	मनु., ७७०	एष दण्डः समाख्यातः,	बृह., ४८३
एवं क्रियाप्रपन्नानां,	बृह., ३६३	एष दण्डः समेषूक्तः,	बृह., ४८६
एवं क्षत्रियविट्शूद्राः,	देव., ८१२	एष दण्डो हि दासस्य,	कात्या., ८००
एवं धृतां बहूनां तु,	याज्ञ., ४९२	एष धर्मः समाख्यातः,	बृह., ३७०
एवं चरेत्सदा युक्तो,	कात्या., ८०६	एष धर्मः समासेन,	मनु., ६१३
एवं तत्रर्णिको ब्रूते,	बृह., ३३१	एष धर्मो गवाक्षस्य,	मनु., ७३९
एवं तत्र विधिना प्रोक्तं,	कात्या., २६२	एष नौयायिनामुक्तो,	मनु., ७९०
*एवं तयोर्द्विधा	श.लि., ७४०	एष वादिकृतः प्रोक्तो,	बृह., ७७३
एवं दण्डविधिं कुर्यात्,	मनु., ४२४	एष वृद्धिविधिः प्रोक्तः,	नार., २८७
एवं धर्मं विजानीमः,	मनु., ७३८	एषां मूर्ध्ना नृपोऽज्ञानां,	बृह., २६
एवं धर्मो दशाहातुः,	कात्या., ४३१	एषां हि विरहेण स्त्री,	मनु., ६१९
एवं परस्परज्ञाने,	बृह., ४४१	एषामग्रे निश्चितस्य,	बृह., ३०
एवं परीक्षितं सभ्यैः,	,, ५१	एषामन्यतमः स्थाने,	मनु., १४१

एषामन्यतमाभावे,  
 एषामन्यतमो यत्र,  
 एषामपतितान्योन्य,  
 एषामभावे पूर्वस्य,  
 एषामेव प्रमेदोऽन्यः,  
 एषु कोशः प्रदातव्यो,  
 एषु वादेषु दिव्यानां,  
 एषु स्थानेषु भूयिष्ठः  
 एषोऽखिलेनाभिहितो,  
 एषोदिता धातकानां,  
 एष्येहि भगवन् धर्मं,

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ऐन्द्रजालिकलुब्ध,

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ओषवाताहतं बीजं,  
 ओषधीर्मन्त्रयोगांश्च,  
 \*औरसः क्षेत्रजः,  
 औरसः क्षेत्रजश्चैव,  
 " " "  
 औरसं पुत्रिकापुत्रं,  
 औरसक्षेत्रजौ पुत्रौ,  
 औरसाः क्षेत्रजास्तेषां,  
 औरसा अपि नैतेऽद्यं,  
 औरसे पुनरुत्पन्ने,  
 औरसो धर्मपत्नीजः  
 औरसो नाम पुत्रः सः,  
 औरसो यदि वा पुत्रः,  
 औरसो विभजन् दायं,

क

कक्षच्छेदे तुलाभङ्गे,  
 कक्षास्थाने यदा तुल्यं  
 कट्यां कृताङ्को निर्वास्यः,  
 कण्ठकेशाम्बरप्राही,  
 कण्ठेऽक्षमालामासज्य,

"

याज्ञ., ९२  
 कात्या., १९५  
 याज्ञ., ५६१  
 याज्ञ., ७६०  
 नार., ४२  
 पिता., २०९  
 कात्या., २०८  
 मनु., ४३  
 मनु., ५०५  
 बृह., ५७५  
 पिता., २१९

नार., ११०

मनु., ७३९  
 पिता., २४०  
 श. लि., ७१२  
 मनु., ७१५  
 नार., ७१६  
 मनु., ७१५  
 ,, ७१०  
 याज्ञ., ६६७  
 नार., ६६८  
 देव., ७१६  
 याज्ञ., ७१९, ७२६  
 देव., ७१९  
 ब्रह्मपु., ७३६  
 मनु., ७१०

व्यास., २२३  
 नार., २१८  
 मनु., ४९१  
 कात्या., ५८०  
 नार., ५२०  
 ,, ७६७

कथं तत्र विभागः स्यात्,  
 कदन्नं च कुवासश्च,  
 कनिष्ठो वाविभक्तस्वः,  
 कन्यकानां त्वदत्तानां,  
 कन्धराबाहुसकथनां च,  
 कन्यां भजन्तीमुत्कृष्ट,  
 कन्यागतं तु तद्वित्तं,  
 कन्याभ्यश्च पितृद्रव्यं,  
 कन्याया दूषणे स्तेये,  
 कन्यायामसकामायां,  
 कन्यायामसकामायां,  
 कन्या वैवाहिके चैव,  
 कन्यैव कन्यां याः कुर्यात्,  
 कन्यैवाक्षतयोनिर्वा,  
 कन्यैवाक्षतयोनिर्वा,  
 कम्पः स्वेदोऽथ वैवर्ण्यं,  
 करणं कारयेद्वापि,  
 करपाददन्तभङ्गे,  
 कराग्रं न धुनेद्यस्तु,  
 करीवास्थितुषाङ्गारः,  
 करीषमिष्टकाङ्गारान्,  
 करौ प्रमर्दितत्रीहेः,  
 कर्णनासाकरच्छेदे,  
 कर्णौ चर्म च वालांश्च,  
 कर्णौष्ठग्राणपादाक्षि,

"  
 कर्तव्यं वचनं तेषां,  
 " " "  
 कर्तव्या न प्रदुष्टास्तु  
 कर्तव्या भ्रातृमिस्तेषां,  
 कर्तव्यो मध्यमो दण्डः,  
 कर्ता च मुच्यते पापात्,  
 कर्ता ममेयं कर्मेति,  
 कर्तुः शरीरसंस्थांश्च,  
 कर्तुः समपदं कार्यं,  
 कर्तृनसौ साक्षिणश्च,  
 कर्म कुर्यात्प्रतिज्ञातं,

मनु., ६५८  
 नार., ६१९  
 कात्या., २७५  
 कात्या., ६७१  
 याज्ञ., ४८९  
 मनु., ५९७  
 कात्या., ६७८  
 देव., ६७०  
 कात्या., ६७  
 नार., ५९६  
 श. लि., ५९६  
 कात्या., ३१५  
 मनु., ५९७  
 नार., ६४४  
 नार., ३१९  
 कात्या., ७८  
 बृह., ३६८  
 याज्ञ., ४८९  
 पिता., बृह., २५२  
 बृह., ४४१  
 मनु., ४४०  
 विष्णु., २२६  
 बृह., ४८८  
 मनु., ४१८  
 कात्या., ४८८  
 ,, ८०२  
 बृह., ४२०  
 याज्ञ., ४२१  
 कात्या., ४४३  
 नार., ६७०  
 बृह., ४८८  
 अङ्गि., ७९५  
 नार., ३७९  
 पिता., २४०  
 बृह., पिता., २२४  
 नार., ४१  
 बृह., ३८५

कर्मणा क्षत्रविच्छेदान्,	कात्या., ३२७	कामतो नामिनन्देत,	नार., ६१६
कर्मणापि समं कुर्यात्,	मनु., ३२६	कामयेत्तत्र सा दण्ड्या,	बृह., ५९३
कर्मणा व्यवहारेण,	कात्या., ३२४	कामात्क्रोधाच्च लोभाच्च,	नार., ४१
कर्म तस्त्वामिनः कुर्यात्,	बृह., ३८५	कामात्तु संश्रितां यश्च,	कात्या., ३९८
कर्माकुर्वन् प्रतिश्रुत्य,	नार., ४०३	कामाद्दशगुणं प्रोक्तं,	मनु., १४१
कर्माणि तु करिष्यामि,	बृह., १५४	कामात्पुरीषं कुर्यात्स,	कात्या., ४५५
कर्मानुरूपं निवेशं,	बृह., ३७०	कामात्मविषयः जुद्रो,	मनु., ७९४
कर्मापि द्विविधं प्रोक्तं,	नार., ३८६	कामात्समाश्रयेदन्यं,	नार., ६४५
कर्मारम्भं तु यः कृत्वा,	कात्या., ४०३	कामानामपि दातारं,	महाभा., ६०८
कर्मापकरणं चैषां,	नार., ४०२	कामार्ता स्वैरिणी वा तु,	कात्या., ५९८
कल्हापकृतं देयं,	याज्ञ., ४९२	कामिनीषु विवाद्देषु,	मनु., २५७
कल्पितो यस्य यो दण्डः,	कात्या., ७९७	कामी तु संस्थितो यत्र,	कात्या., ५८१
कवाटबीजसंयुक्तां,	पिता., २१६	कायाविरोधिनी शश्वत्,	व्यास., २८२
कश्चित्कृत्वात्मनश्चिह्नं,	नार. बृह., ४९६	” ”	नार., २८३
कश्चित्चेत्संचरन् देशान्,	नार., ३६२	कायिका कालिका चैव,	नार., २८२
काकिणी तु चतुर्भागं,	नार., ८०९	कारणं कारणोपेते,	बृह., ६९
काकिण्यादिस्तु यो दण्डः,	नार., ७९८	कारणं भुक्तिरेवैका,	नार., १७९
काकिण्यादिस्त्वर्थदण्डः,	नार., ७९८	कारणप्रतिपत्तौ तु,	नार., ८९
काकिण्यो वधिकाश्चैव,	मनु., ७६१	कारणात्पूर्वपक्षेऽपि,	कात्या., ८७
काङ्क्षन्ति पितरः पुत्रान्,	बृह., ७४३	कारणे विधिरेव स्यात्,	व्यास., ३३१
काणं खञ्जं च नादद्यात्,	बृह., ३७०	कारयित्वोत्तरं सम्यक्,	बृह., ८७
काणं वाप्यथवा खञ्जं,	मनु. नार., ४७५	कारयेदायसं पात्रं,	पिता., २५२
*कानीनः पञ्चमः,	वसि., ७२९	कारयेत्तद्बहुत्वं चेत्.	कात्या., ६१२
कानीनं च सहोदरं च,	मनु., ७१५	कारयेद्दासकर्मणि.	कात्या., ३९६
कानीनश्च सहोदरश्च,	नार., ७१६	कारयेद्वा ऋणी लेख्यं,	बृह., ३२७
” ” ,	” ७३०	कारयेत्प्रत्ययायैव,	कात्या., ३०५
” ” ,	बृह., ७१७	कारयेत्सज्जनैस्तानि.	कात्या., २०८
” ” ,	मनु., ७१५	कारयेत्सर्वदिव्यानि,	विष्णु. याज्ञ., २१३
*कानीनसहोदरं,	गौत., ७१२	कारयेन्निष्कृतिं कृच्छ्रं,	बृह., ५९४
कान्तारकास्तु दशकं,	याज्ञ., २८३	कारयेन्मण्डलान्यष्टौ,	बृह. पिता., २२४
कामं तदपि गृहीयात्,	कात्या., ४९	कारावरो निषादात्तु,	मनु. विष्णु. ८२२
कामं तु क्षपयेद्देहं,	मनु., ६३६	कारिता च शिखा वृद्धिः,	बृह., २८२
*कामं वसेयरेकं,	श. लि., ६५१	कारुष्यश्च विजन्मा च,	मनु., ८२६
कामक्रोधाभिभूतार्थं,	नार., २७०	कार्मिकं रोमबद्धं च,	याज्ञ., ५२५
कामक्रोधास्वतन्त्रार्थं,	कात्या., ३७९	कार्यः क्षतानुरूपस्तु,	बृह., ४८८
कामक्रोधौ तु संश्रम्य,	मनु., ११	कार्यः परीक्षकैर्नित्यं,	पिता २१७
कामतस्तु भजेदेनं,	नार., ६४५	कार्यं तु साधयेद्यो वै,	कात्या., ५७०

कार्यं तु कार्याणामेवं,  
कार्यगौरवमासाद्य,  
कार्यबाधावहीनस्तु,  
कार्यमुद्दिश्य पीडां यः,  
कार्यस्य निर्णयं सम्यक्,  
कार्याणां निर्णयार्थेषु,  
कार्यातिपातव्यसनि,  
कार्यार्थे कार्यनाशः स्यात्,  
कार्ये चाधर्मसंयुक्ते,  
कार्येष्वभ्यन्तरो यश्च,  
कार्यो बलेन महता,  
कार्यौ द्वितीयापराधे,  
कार्षापणं भवेद्दण्डयो,  
कार्षापणप्रमाणं तु,  
कार्षापणस्तु विज्ञेयः,  
कार्षापणाद्या ये प्रोक्ताः,  
कार्षापणान्ता सा दिव्ये,  
कार्षापणावराधस्तु,  
कार्षापणो दक्षिणस्यां,  
कार्षापणोऽब्दिका ज्ञेया,  
कार्षापणसमलंकारः,

“ “  
कालं देशं च विज्ञाय,  
कालं प्रार्थयते यत्र,  
कालं विवादे याचेत,  
कालं संवत्सरादवार्क,  
कालकूटमलायुं च,  
कालं तत्र न कुर्वीत,  
कालदेशविरोधे तु,  
कालमासाद्य कार्यं च,  
कालशक्ती विदित्वा तु,  
कालहीने ददद्दण्डं,  
कालाकृतिवयोद्रव्यं  
कालातिहरणाद्भुक्तिः,  
कालातीतेषु वा कालं,  
काले कार्यार्थिनं पृच्छेत्,  
काले कालकृतो नश्येत्,

कात्या., ३८  
नार., ११८  
बृह., ४९  
उश., ४६  
कात्या., ३८  
कात्या., २५९  
कात्या., ५५  
कात्या., ८०६  
बृह., ३७९  
नार., कात्या., ९९  
प्रजा., १६८  
याज्ञ., ५३१  
मनु., ७९९  
नार., ८०९  
मनु., ८०८  
नार., ७९९  
बृह., १९९  
नार., ७९९  
नार., ८०९  
नार., ८०९  
मनु., ८३२  
यम., ८३२  
कात्या., ५६  
बृह., ६४  
कात्या., ६४  
कात्या., ६६, ६६  
नार., २४०  
कात्या., ६७  
कात्या., २०७  
मनु., ५३०  
कात्या., ६५  
कात्या., ३४५  
व्यास., १५०  
नार., १८२  
कात्या., ६४  
कात्या., ४७  
याज्ञ., २९७

कालेऽदाता पिता वाच्यो,  
कालेन विधिना देयं,  
कालेऽदूर्णे त्यजन्कर्म,  
काले व्यतीते प्रतिभूः,  
काष्ठभाण्डनृणादीनां,  
काष्ठलोष्टेष्टपाषाण,  
कासत्यकस्माच्च भृशं,  
किं कार्यं का च ते पीडा,  
किञ्चिदूनं प्रदाप्यः स्यात्,  
किञ्चिदेव तु दाप्यः स्यात्,  
किं तु राजा विशेषेण,  
कित्वलंकृत्य सत्कृत्य,  
\*किण्वकार्पाससूत्रं,  
कितवान् कुशीलवान् केरान्.  
कितवेष्वेव तिष्ठेरन्,  
कीर्तिते यदि भेदः स्यात्,  
कीनाशाः कारुकाः क्षिल्पि,  
कीनाशो गोवृषो यानं,  
\*कुक्कुटानां प्रहरं,  
कुटुम्बं विभूयाद्भ्रातुः,  
कुटुम्बभक्तवसना,  
कुटुम्बार्थमशक्तेन,  
कुटुम्बार्थेऽध्यधीनोऽपि,  
कुटुम्बार्थेषु यो युक्तः,  
कुटुम्बिनायका यस्य,  
कुटुम्बिनोऽथ कायस्थ,  
कुल्यव्यवहितो यस्तु,  
कुसीदात्सीदतश्चैव,  
कुहालपाणिर्विज्ञेयः,  
कुनखी श्यावदच्छिन्न.  
कुमार्यां तु स्वान्यादाय,  
कुरुते दानहरणं,  
कुर्युरर्थं यथा पण्यं,  
कुर्याच्च सदृशं लेख्यं,  
कुर्याच्छास्त्रप्रमाणेन,  
कुर्याच्छुश्रुरयोः पादं,  
कुर्यात्प्रत्यमिगोमं च,

मनु., ६०४  
कात्या., ३१३  
नार., ४०५  
कात्या., ३०४  
नार., ५३६  
याज्ञ., ५०१  
नार., १४०  
कात्या., ४७  
व्यास., ३४४  
मनु., ५८३  
नार., १६  
नार., ५९६  
विष्णु., २९०  
मनु., ५२७  
नार., ७६८  
कात्या., ४४६  
बृह., ३१  
मनु., ६९७  
श. लि. ८३०  
नार., ६८२  
बृह., ३७५  
कात्या., ३१४  
मनु., ३१४  
नार., ६६५  
व्यास., १५७  
व्यास., १५७  
बृह., १००  
बृह., २७७  
नार., १९५  
नार., ११०  
आप., ५९५  
बृह., ४५१  
मनु., ५१८  
व्यास., १७२  
कात्या., ४४  
याज्ञ., ६२०  
याज्ञ., ७२

कुर्यादलमकौ रक्षेत्,  
कुर्यान्न्यूनाधिकं तुल्यं,  
कुर्युः कर्मणि नृपतेः,  
कुर्युर्मयाद्वा लोभाद्वा,  
कुर्युर्यथेष्टं तत्सर्वं,  
कुर्युस्तेऽव्यभिचारेण,

“  
कुर्वन्ति क्षेत्रिणामर्थं,  
कुर्वन्ति सदृशं लेख्यं,  
कुर्वन्त्युत्कोचकास्ते तु,  
कुर्वन्त्यौपाधिकाश्चान्ये,  
कुर्वीत चैषां प्रत्यक्षं,  
कुर्वीत जीवनं येन,  
कुर्वीत पुनराह्वानं,  
कुर्वीत शासनं राजा,  
कुलं काण्डमिति ख्यातं  
कुलजे वृत्तसंपन्ने,  
कुलधर्मं तु तं प्राहुः,  
कुलशीलवयोवृत्तं,  
कुलश्रेणिगणादीनां,  
कुलश्रेणिगणाध्यक्षाः,  
कुलादिभ्योऽधिकाः सभ्याः,  
कुलादिभिर्निश्चितेऽपि,  
कुलादीनां समक्षं चेत्,  
कुलानि जातीः श्रेणीश्च,  
कुलीनदक्षानलसैः,  
कुलीनारूपवत्यश्च,  
कुलीनार्यविशिष्टेषु,  
कुले ज्येष्ठस्तथा श्रेष्ठः,  
कुले तदवशेषे च,  
कुले मुख्येऽपि जातस्य  
कुले विनीतविद्यानां,  
कुलैश्च यत्कृतं कार्यं,  
कुल्याः कुलविवादेषु,  
कुल्याः संबन्धिनश्चैव,  
कुल्या दुहितरो वापि,  
कुल्याभावे स्वधादाता,

बृह., २७  
बृह., ७७१  
कात्या., ५४२  
कात्या., ४४६  
नार., ७६०  
नार., ३५९  
,, ३६१  
मनु., ७३८  
बृह., १६६  
व्यास., ५२१  
व्यास., ५१२  
मनु., ५१७  
कात्या., ६६३  
व्यास., ५६  
मनु., ५१०  
यमः, ७१८  
मनु., ३३९  
कात्या., २०  
कात्या., ३०  
बृह., १७०  
बृह., ३०, ४२५  
बृह., ३०  
बृह., नार., २६८  
कात्या., ११६  
याज्ञ., ७७५  
बृह., ३५८  
महाभा., ६०७  
कात्या., ८०१  
नार., २७३  
नार., ६३९  
मनु., ८२८  
कात्या., ६८१  
कात्या., ३१  
नार., कात्या., ९९  
कात्या., ११३  
देव., ७४९  
देव., ७०३

कुल्यायननिरोधश्च,  
कुष्ठिनीं पतितां बन्ध्यां  
\*कुसीदं पशूपं,  
कुसीदपशुवाणिज्ये,  
कुसीदपथमाहुस्तं,  
कुसीदवृद्धिद्वैगुण्यं,  
कुसीदवृद्धिर्धर्म्या,  
कुसीदादिविधिस्त्वेव,  
कुसीदाद्यैः पदैर्हानो,  
कुहकः प्रत्यवसितः,  
कुहकाशङ्कया राजा  
\*कूटतुलामानं,  
कूटलेख्यं तु तत्प्रोक्तं,  
\*कूटशासनकर्तृश्च,  
कूटशासनप्रयोगे,  
कूटसभ्यः कूटसाक्षी,  
\*कूटसाक्षिणां,  
कूटसाक्षी स विज्ञेयः,  
कूटसाक्ष्यं तु कुर्वाणः,  
कूटसाक्ष्यपि निर्वास्यः,  
कूटस्वर्णव्यवहारी,  
कूटाक्षदेविनः क्षुद्राः,  
कूटाक्षदेविनः पापात्,  
कूटोक्तौ साज्जिणां वाक्बात्,  
\*कूपपथस्थानं,  
कूष्माण्डैर्वापि जुहुयात्,  
\*कृच्छ्रमदण्डने,  
कृतः पञ्चविधस्तेषां,  
कृतं चेदेकदिवसे,  
कृतं तद्धर्मतो विद्यात्,  
कृतं रूपार्थलोभेन,  
कृतकार्यसहायाश्च,  
कृतकालव्युपरमात्,  
कृतकाष्ठाश्मकौलालः  
कृतमस्वामिना यच्च,  
कृताकृता वा पुत्रस्य,  
कृतानुसारादधिका,

बृह., ४२३  
देवल., ६१६  
गौत., २८९  
बृह., २७६  
मनु., २८६  
मनु., २८८  
गौत., २७८  
बृह., २९७  
बृह., ४९  
नार., ११०  
पिता, २४४  
श. लि., ५१५  
बृह., १६४  
विष्णु., ५७०  
श. लि., ५७०  
बृह., १२६  
विष्णु., ३९, १४२  
नार., १४०  
मनु., १४२  
कात्या., ८०२  
याज्ञ., ५२२  
बृह., ५२१, ७६७  
नार., ५२०  
कात्या., १६८  
हारी., ६२४  
मनु., १४७  
वसि., ७९६  
नार., ९८  
बृह., ७७२  
मनु., २६७  
बृह., ५७७  
नार., ५४३  
नार., ३९१  
श. लि., ५३६  
कात्या., १६४  
बृह., ७४७  
मनु., २८६

कृतान्नं चाकृताज्ञेन,  
कृते कर्मणि यः स्वामी,  
कृतेऽकृते विभागे वा,  
कृत्रिमः पञ्चभागं तु,  
कृत्वा चौरस्य हन्तुर्वा,  
कृत्वा मृषा तु शपथं,  
कृत्वोद्धारमदत्त्वा यो,  
कृत्स्नमेव लभेतांशं,  
कृमिचौरव्याघ्रभयात्,  
कृशातिवृद्धं शूद्रं च,  
कृष्णलैश्वोक्तमेव स्यात्,  
केदाराराममागैश्च,  
केन कस्मिन्कदा कस्मात्,  
केवलं शास्त्रमाश्रित्य,  
\*केशाकेशिग्रहणात्,  
केशाकेशिगृहीतश्च,  
केशाकेशिग्रहैश्चापि,  
केशेषु गृह्यतो हस्तौ,  
कैवर्तमिति यं प्राहुः,  
कोऽर्थस्तेन तु पुत्रेण,  
कोशः प्राज्ञैर्न दातव्यो,  
कोशपानं तदर्थं वा,  
कोशेन लेख्यक्रियया,  
कोष्ठागारागुधागार,  
कौमारं पतिमुत्सृज्य,  
कौशेयं चोत्तमद्रव्यं,  
कौशेयवल्कलादीनां,  
कमशः कथ्यते वादो,  
कमशः संप्रवक्ष्यामि,  
कमागतः शासनिकः,  
कमात् पितृणां नामानि,  
कमादभ्यागतं द्रव्यं,  
कमादव्याहतं प्राप्तं,  
कमाहते तु धर्मोऽयं,  
कमायाते ह्येष धर्मो,  
कमेणाचार्यसच्छिष्य,

बृह., ६४१  
बृह., ४०८  
बृह., ७०७  
ब्रह्मसु., ७११  
याज्ञ., ५४८  
यमः, २५७  
कात्या., २८६  
मनु., ३६४  
बृह., ४१५  
बृह., ३७०  
कात्या., ८०९  
नार., ४४५  
कात्या., ४७  
बृह., १५  
श.लि., १९५  
नार., १९५  
व्यास., ५७९  
मनु., ४९१  
मनु., विष्णु., ८२२  
बृह., ६६६  
पिता., २०७  
कात्या., २०२  
बृह., ४२०  
मनु., ५३०  
नार., ६४४  
बृह., ५५७  
नार., ५२६  
बृह., ३८२  
,, २७७  
,, १७७  
कात्या., ६०  
याज्ञ., ६७२  
नार., ३१०  
कात्या., ६४७  
नार., ३६८  
याज्ञ., ७५४

कमादेते प्रवर्तन्ते,  
कयं शिल्पिषु निक्षिप्तं  
कयः प्रोक्षितनिक्षिप्तं,  
कयविक्रयधर्मेषु,  
कयविक्रयानुशये  
कयविक्रयानुशयो,  
कयेण स विशुद्धस्तु,  
कयो वा निःस्त्रवस्तस्मात्,  
क्रियते धर्मतत्त्वज्ञैः,  
क्रियते निर्णयस्तत्र,  
क्रियमाणे तु कर्तव्ये,  
क्रियां बलवतीमुक्त्वा.,  
क्रियाकारेषु सर्वेषु,  
क्रियाणां सर्वनाशः स्यात्,  
क्रियापादस्तथा चान्यः,  
क्रियापादश्च तेनायं,  
क्रिया बलवती पूर्वा,  
क्रियाभेदो मनुष्याणां,  
क्रियाभ्युपगमादेतत्,  
क्रियार्णादिषु सर्वेषु,  
क्रियार्थिनावरुद्धः,  
क्रियावधारणोपेतं,  
क्रियावसन्नोऽप्यर्हेत्तु,  
क्रिया वा दैविकी प्रोक्ता,  
क्रियासमूहकर्तृत्वे,  
क्रियास्थित्यनुरूपस्तु  
क्रीडते पतिना सार्धं,  
,,  
क्रीडाशरीरसंस्कार,  
क्रीणीयायस्त्वपत्यार्थे,  
क्रीतं तत्स्वामिने देयं,  
क्रीतानुशय इत्येतत्,  
क्रीत्वागच्छन्ननुशयं,  
क्रीत्वात्वानुशयात्पण्यं,  
क्रीत्वा नानुशयः कार्यः,  
क्रीत्वा नानुशयं कुर्यात्,

नार., ७१७  
कात्या., १९१  
,, ३३९  
नार., ४२९  
बृह., ४३८  
मनु., ४३  
,, ३५२  
याज्ञ., ५१७  
नार., २३७  
बृह., २६१  
,, १००  
कात्या., ९०  
,, १२४  
संवर्त., १७३  
बृह., ४५  
कात्या., ४८  
बृह., ७७२  
नार., ४२  
मनु., ७२२  
नार., ७७२  
कात्या., ५२  
बृह., १५९  
नार., २६३  
कात्या., ९३  
कात्या., २०९  
,, ६५  
अङ्गि., ६३३  
व्यास., ६३४  
याज्ञ., ६३१  
मनु., ७३२  
कात्या., ४३७  
नार., ४३५  
कात्या., ४३५  
,,  
याज्ञ., ४३६  
नार., ४३६

क्रीत्वा प्राप्तिं न गृहीयात् ,	कात्या., ४३१	*क्षत्रियस्य क्षत्रिया,	,, ६५९
क्रीत्वा मूल्येन यः पण्यं,	नार., ४३५	क्षत्रियस्यापि भार्ये द्वे,	महाभार., ६९८
क्रीत्वा विक्रीय वा किञ्चित् ,	मनु., ४३०	*क्षत्रियाच्चेतुत्य,	गौत , ७०१
कुडः शत्रुगृहं गच्छेत् ,	,, १३२	क्षत्रियाच्छूद्रकन्यायां,	मनु., ८१३
कुडहृष्टप्रमत्तात्,	बृह., ३७९	क्षत्रियाज्जातमेवं तु,	मनु., ८२५
क्रूरं धनुः सप्तशतं,	नार., २३४	क्षत्रियाज्जायते सूतो,	यम., ८१८
केता पण्यं परीक्षेत,	नार., ४३६	*क्षत्रियादीनां ब्राह्मणवधे,	बौधा., ५७२
केतारश्चैव भाण्डानां,	कात्या., ५४९	*क्षत्रियाद्ब्राह्मण्यां,	,, ८१८
केतुराज्ञोर्मूलदमौ,	बृह., ३५१	*क्षत्रियापुत्रस्त्रीन् ,	विष्णु., ६९९
केत्रे मूल्यं प्रदाप्यस्ते,	,, ५२४	क्षत्रियायां तु वैश्येन,	यम., ८१८
कोधादिना निमित्तेन,	,, ५७२	*क्षत्रियायां मागधः,	श.लि., ८१५
*क्रोशतस्तथाधिकृतान् ,	श.लि., ४७७	*क्षत्रियायां वैश्यशूद्रौ,	हारी., ८१८
क्लान्तसाहसिकाश्रान्त.,	नार., ११०	क्षत्रियायामगुप्तायां,	मनु., ५९१
क्लीवं विहाय पतितं,	कात्या., ७२८	क्षत्रियाया हरेत्पुत्रः,	महाभार., ६९८
क्लीबातुरान्सत्त्वहीनान् ,	नार., २०५	क्षत्रिया षट् समास्तिष्ठेत् ,	नार., ६४२
क तद्वदतु साक्षित्वम् ,	नार., ११५	*क्षत्रियेण,	पैठीन., ८१९
क्षतं भङ्गोपमादौ वा,	कात्या., ५५९	*क्षत्रियेण कृष्णायां,	,, ,
क्षतस्याल्पमहत्वं च,	बृह., कात्या , ५७३	*क्षत्रियेण क्षता,	पैठीन., ८१९
क्षतारं क्षत्रिया शूद्रान् ,	नार., ८७६	*क्षत्रियेण वैश्यायां	उशना., ८१४
*क्षत्तुः प्रतीहार,	श.लि., ८३०	,,	श. लि. ,
क्षत्तुर्जातस्तथोग्रायां,	मनु., विष्णु., ८२०	क्षत्रपुलकसानां तु,	मनु., ८२९
*क्षत्तुवैदेहकयोः,	बौधा., ८१८	क्षत्र्यां तथोग्रजः पुत्रः,	देव., ८२०
*क्षत्तुवैदेहकौ,	शङ्ख , ८१५	क्षत्र्यामुग्रसंगे,	श. लि., ८१९
क्षत्रविद्रुशूद्रधर्मस्तु,	कात्या., ३९६	क्षन्तव्यं प्रभुणा नित्यं,	मनु., ४७
क्षत्रविद्रुशूद्रयोनिस्तु,	मनु., ८०२	क्षमालिङ्गानि चान्यानि,	कात्या., ६०
क्षत्रशूद्रवपुर्जन्तुः,	मनु., ८१३	क्षयं वृद्धिं च जानीयात्	,, ४३६
क्षत्रियं चैव वैश्यं च,	मनु., ३९७	क्षयं वृद्धिश्च वणिजा,	याज्ञ., ,
क्षत्रियं मध्यमं वैश्यं,	याज्ञ., ५६४	क्षयः संस्क्रियमाणानां,	नार., ५२४
क्षत्रियं मध्यमं चैव	बृह., ४७९	क्षयोदयेन चाल्पा सा,	बृह., ४५१
*क्षत्रियवर्जं सप्तधा,	विष्णु., ६१९	क्षयोदयौ जीवनं च,	,, ४५०
*क्षत्रियवैश्यानु,	वसि., ८२३	क्षयो हानिर्यदा तस्य,	,, ३६०
,,	श.लि., ,	क्षिपन् स्वसादिकं दद्यात्,	,, ४७८
*क्षत्रियवैश्यानुलोमान्तर,	वसि., ,	क्षिप्तेस्तु मज्जनं कार्यं,	कात्या., २३५
*क्षत्रियवैश्यानुलोमान्तरोत्पन्नो,	श.लि., ८२३	क्षुद्रकाणां पशूनां च,	मनु., ५०२
*क्षत्रियवैश्यौ राज,	विष्णु., ७००	*क्षुद्रपशवः सर्वथा,	श. लि., ४६९
क्षत्रियश्चतुर्थमंशं,	,, ७९२	क्षुद्रमध्यमहाद्रव्यं,	याज्ञ., ५३७

क्षुद्रमध्यमोत्तमानां तु,  
क्षेत्रं गृहीत्वा यः कश्चित्,  
क्षेत्रं चेद्विक्रयेत्कश्चित्,  
क्षेत्रं त्रिपुरुषं यत्स्यात्,  
क्षेत्रं सप्तस्यमुल्लङ्घ्य,  
क्षेत्रकूपतडागानां,

क्षेत्रं जादीन् सुतानेतान्,  
क्षेत्रजायाः सुताश्चान्ये,  
क्षेत्रजो गर्हितः सद्भिः  
क्षेत्रजेषु च पुत्रेषु,  
\*क्षेत्रबीजभक्त,  
\*क्षेत्रमर्यादाभेदेऽष्टशतं  
क्षेत्रमेकं द्वयोर्बन्धे.  
क्षेत्रवास्तुतडागेषु  
क्षेत्रवेशमग्रामवन  
क्षेत्रसीमाविरोधेषु,  
क्षेत्रस्य हरणे दण्डा,  
क्षेत्राधिकं यदा भुक्तं,  
क्षेत्रादीनां तथैव स्यात्,  
क्षेत्राधिकारो यत्र स्यात्  
क्षेत्रारामविवीतेषु,  
क्षेत्रिकस्य मतेनापि,  
क्षेत्रिकस्यात्यये दण्डो,  
क्षेत्रिकस्याविज्ञानेन,  
क्षेत्रिकासुमते बीजं,  
\*क्षेत्रिणः पुत्रो जनः,  
\*क्षेत्रियः पारदारि,  
क्षेत्रेण्येषु तु पशुः,  
क्षेत्रोपकरणं सेतुं,  
क्षेपं करोति चेद्दण्ड्यः  
\*क्षेपेऽष्टशतं यथानुरूपं,  
क्षेप्ता च क्षत्रियः कार्यः,  
\*क्षेमकृद्राजा यस्य,

नार., ५०६  
व्यास., ४६१  
नार., ४५९  
नार., ४५९  
बृह., ४५९  
मनु., ४५२  
कात्या., ४५२  
मनु., ७३५  
बृह., ७११  
७१७  
नार., ६६१  
श. लि., ८०  
४५६  
बृह., ३०१  
कात्या., ४४३  
याज्ञ., ५६७  
नार., ४४४  
याज्ञ., ४५६  
बृह., २९७  
कात्या., २७५  
नार., ४३८  
कात्या., ४७०  
७२२  
मनु., ५३२  
७३९  
नार., ७२२  
वसि., ७३७  
गौत., ७३९  
मनु., ४६४  
बृह., ५५७  
याज्ञ., ४७५  
श. लि., १९६  
पिता., २३४  
आप., ५११

ख

खरगोमहिषोष्टादीन्,

कात्या., ५००

खसजाताः प्रगृह्णन्ति,  
खादयेद्वा सारमेयैः,  
खादिरां कारयेत्तत्र,  
खिलोपचारं तत्सर्वं,  
ख्यापितं चेद्वितीयेऽहि,

बृह., २१०  
५९३  
नार., २१४  
४८९  
कात्या., १६२

ग

गच्छेत्परमया शक्त्या,  
\*गजाश्वोष्टघाती,  
गणको गणयेदर्थं,  
गणको लेखकश्चैव,  
गणद्रव्यं हरेद्यस्तु,  
गणनावक्षकाश्चैव,  
गणपाषण्डपूगाश्च,  
गणवृद्धादयस्त्वन्ये,  
गणानां वक्षकाश्चैव,  
गणानां श्रोणिवर्णानां,  
गणिमं तुलिमं मेयं,  
गणैश्च श्रेण्यविज्ञातं,  
गन्धमाल्याम्बुश्चापि,  
गमने त्वागमः कार्यः,  
गम्याः स्युरानुलोम्येन,  
गम्या अपि हि नोपेया  
गम्यास्वपि पुमान् दाप्यः,  
गयां यास्यति यः कश्चित्,  
गरदाग्निद कीनाशः,  
गर्तानूपं सुसेकश्च,  
गर्दभाजाविकानां तु,  
\*गर्भघ्नीमधोवर्णगाम्,  
गर्भपातो नखानां च,  
गर्भभर्तृवधे तासां,  
गर्भस्थैः सदृशो ज्ञेयः,  
गर्भिणी तु द्विमासादिः,  
\*गर्भिणी या संस्क्रियते,  
गवत्रं गोमिनां देयं,  
गवां क्षीरभृतो यस्तु,  
गवां प्रचारे गोपालः,

पिता-नार., २३८  
विष्णु., ४९९  
बृह., २७  
कात्या., ३०  
याज्ञ., ४२४  
बृह., ७६७  
कात्या., ८१०  
नार., ४४७  
बृह., ५२१  
कात्या., ४२८  
नार., ४२९  
बृह., ३०  
कात्या., ५८०  
२३५  
नार., ५९८  
५९८  
याज्ञ., ५९८  
बृह., ७४३  
नार., १०९  
बृह., ३७०  
मनु., ५०२  
हारी., ६१८  
कात्या., ५८०  
याज्ञ., ६१८  
नार., २७४  
मनु., ७८९  
विष्णु., ७३०  
नार., ४३७  
मनु., ४१३  
नार., ५४



गवां शताद्वत्सतरी,	,,	४१३
गवादिषु प्रणष्टेषु.	,,	५४४
गर्हः स पापी दण्ड्यश्च,	कात्या.,	४२३
गात्रं च कम्पते यस्य,	बृह. कात्या.	२५१
गावः पादं प्रदण्ड्याः स्युः,	नार.,	४६६
गुडे मधुनि चैनोक्ता,	बृह.,	२८९
गुणमुद्दिश्य यैः किञ्चित्,	कात्या.,	४२८
गुणहीनस्य पारुष्ये,	बृह.,	४७९
गुणाधिकाय वा दत्ता,	,,	४५१
गुणिद्वैधे क्रियायुक्ताः	,,	१४८
गुणिद्वैधे तु वचनं,	याज्ञ.,	१४९
गुप्तायाः संग्रहे दण्डो,	व्यास.,	५८८
गुप्ते तु बन्धने बध्वा,	यम.,	५७३
गुरुकार्येषु दण्डः स्यात्,	कात्या.,	५६
गुरुतल्पे भगः कार्यः	नार.,	७८६
,,	मनु.,	७८४
गुरुतल्पे सुरापाने,	नार.,	७८५
गुरुत्वादस्य कार्यस्य,	,,	४४५
गुरुमि यै न शास्यन्ते,	हारी.,	७७७
गुरुरात्मवतां शास्ता,	,,	,,
गुरुशिष्यौ पितापुत्रौ,	बृह.,	५०
गुरून् पुरोहितान् पूज्यान्,	,,	७८०
गुर्वाचार्यनृपादीनां,	कात्या.,	४५५
गुल्मगुच्छक्षुपलता,	याज्ञ.,	५०३
गुल्मान् वेणुश्च विविधान्,	मनु.,	४४०
गूढजं चापविद्धं च,	,,	७१५
गूढद्रव्यामिशङ्कायां,	कात्या.,	६७३
गूढसाहसिकानां तु,	,,	९५
गूढास्तु प्रकटाः सभ्यैः,	,,	१२०
गूढश्चोत्तरसाक्षी च,	नार.,	९९
गूढोत्पन्नश्च कानीनः,	ब्रह्म.पु.,	७३६
गूढोत्पन्नोऽपविद्धश्च,	मनु.,	७१५
गूढमानस्तु दौशशील्यात्,	नार.,	५७४
गृहं क्षेत्रं च दृष्टे द्वे,	,,	४६०
गृहं गृहस्य निर्दिष्टं,	कात्या.,	४४७
गृहं तडागमारामं,	मनु.,	४५६

गृहं द्विजातयः सर्वे,	बृद्धमनु.,	७०२
गृहं पत्नी न ह्यपत्नीकं,	हारी.,	६२३
*गृहं यवीयसे,	श.लि.,	६५९
गृहं वार्यापणं धान्यं,	बृह.,	३००
*गृहं कुडयायुपमेत्ता,	विष्णु.,	५५९
*गृहक्षेत्रयोर्विरोधे,	श.लि.,	४४४
गृहक्षेत्रादिकं क्रीत्वा,	बृह.,	१५४
गृहचारी स विज्ञेयः,	बृह. कात्या.,	१००
गृहजातस्तथा क्रीतो,	नार.,	३८७
गृहद्वारशुचिस्थानं,	,,	३८६
गृहप्रासादवसथेः,	कात्या.,	४५२
गृहमागल्य या नारी,	बृह.,	५९३
गृहमेधा भवेन्नित्यं,	ऋश्यशृङ्गः.,	६२२
गृहवार्यापणादीनि,	कात्या.,	४११
गृहवासः सुखार्थं हि,	दक्ष.,	६१४
गृहात्स्तोमः सदः क्षेत्रात्,	बृह.,	२८५
गृहिणः पुत्रिणो मौलाः,	मनु.,	१०५
गृहीतं पालयेद्यत्नात्,	बृह.,	३४०
गृहीतं स्त्रीधनं भर्ता,	याज्ञ.,	६८७
गृहीतः शङ्कया चौर्यं,	याज्ञ.,	५४७
गृहीतः शङ्कया यस्तु,	बृह.,	५७५
गृहीतग्रहणो न्यायो,	कात्या.,	५८
गृहीतदोषान्नष्टश्चैत,	व्यास.,	२९४
*गृहीतधनप्रवेशार्थमेव,	विष्णु.,	२९७
*गृहीतमूल्यं यः क्रेतुः,	,,	४३०
गृहीतमूल्यो गोपालः,	ब्रह्मपु.,	४१६
गृहीतचेतनः कर्म,	बृह.,	४०३
,,	याज्ञ.,	,,
गृहीतशिल्पः समये,	नार.,	३८५
गृहीतानुक्रमाद्वाप्यो,	याज्ञ.,	३३५
गृहीता यदि नष्टः स्यात्,	मनु.,	३१३
गृहीता सह योऽर्थेन,	नार.,	३४२
गृहीतुराभवेद्गन्तं,	,,	४१२
गृहीत्वा तस्य सर्वस्वं,	कात्या.,	१२२
गृहीत्वा निहुते यत्र,	बृह.,	३४६
गृहीत्वा बन्धकं यत्र,	कात्या.,	३०५
गृहीत्वा बाहयेत्काले,	बृह.,	४६०

गृहीत्वा वेतनं वेश्या,	मत्स्यपु., ४०९	गोभूहिरण्यस्त्रीस्तेय,	नार., ६७
गृहीत्वोपगतं दद्यात्,	नार., ३३८	गोमयेन कृतानि स्युः,	बृह-पिता., २२४
गृहे च गूढ उत्पन्नः,	यम., ७१४	गोमिनामेव ते वत्साः,	मनु., ७३८
गृहेषु मूषितं राजा,	कात्या.नार., ५५२	गोरक्षकान् वाणिजकान्,	कात्या., २०५
गृहोद्यानतडागानां,	कात्या., ४५८	,,	,, १३५
गृहोपस्करवाह्यानां,	,, ६९५	गोरसेक्षुविकाराणां,	नार., ५३६
गृहोपस्करवाह्यास्तु,	,, ६७३	गोवद्रजतवस्त्रेषु,	मनु., १३३
गृह्णन्ति छद्मना चार्थं,	व्यास., ५२१	*गोऽश्वखरोष्ट्र,	विष्णु., ५३१
गृह्णात्यदत्तं यो मोहात्,	नार., ३८०	गोषु ब्राह्मणसंस्थासु,	नार., ५३०
गृह्णीयात् तन् स्वयं नष्टः	कात्या., ५५३	,,	मनु., ,
गृह्णीयात् ततः शुद्धम्,	नार., ७९१	गोस्वाम्यनुमते भृत्यः,	,, ४१३
गृह्णीयाद् धूर्तकितवात्,	याज्ञ., ७६४	गोहर्तृर्नासिकां छित्वा,	बृह., ५३०
गुह्याङ्गस्पर्शनोच्छिष्ट,	नार., ३८६	गोहर्तृर्नासिकां छित्वा,	,, ,
गोकुमारीदेवपशून्,	मनु., ५००	गौः प्रसूता दशाहं तु,	नार., ४६९
गोचरे यस्य मुष्येत,	नार., ५५२	गौतमानामनिष्टं तत्,	कात्या., ५४१
*गोचर्यमात्र साक्षीणी,	विष्णु., ३०१	गौरवानुक्रमादस्य,	नार., ४७१
*गोचर्यमात्राधिकां भुवं,	,, ,	असितारः स्वयं कार्या,	मनु., ५६४
गोचोरस्य प्रदातव्यम्,	बृह., २००	ग्रहणं तत्प्रविष्टानां,	कात्या., ४७०
गोत्ररिक्तानुगः पिण्डो,	मनु., ७३१	ग्रहणं लक्षणं लाभं,	,, ३३५
गोत्ररिक्त्ये जनयितुः,	मनु., ७३१	ग्रामक्षेत्रगृहादीनां,	बृह., ४३८
गोत्रसाधारणं त्यक्त्वा.,	बृह., ७०७	ग्रामघाते हिलाभज्जे,	मनु., ५५०
गोत्रस्थितिस्तु या येषां,	कात्या., २०	ग्रामचारी नृपैर्वैध्यः,	ब्रह्मपु., ४१६
गोपशौण्डिकशैलुष,	याज्ञ., ३१७	ग्रामजातिसमूहेषु,	मनु., ४२४
गोपस्ताब्जश्च गोमी तु	याज्ञ., ४६७	ग्रामयोः रुभयोः सीम्नि,	व्यास., ४४९
गोपाः शाकुनिका व्याधाः,	नार., ४४४	ग्रामयोः रुभयोर्यत्,	बृह., ४५१
गोपालहस्ते संस्था,	ब्रह्मपु., ४१७	,,	व्यास., ४४९
गोप्यभोग्यक्रियायुक्तं,	बृह., १५४	ग्रामश्च प्राङ्निवाकश्च,,	नार-कात्या., ९९
गोप्याधिभोगे नो वृद्धिः,	याज्ञ., २९३	ग्रामश्रेणिगणानां च,	बृह., ४२०
गोप्याधिद्विगुणादूर्ध्वं,	बृह., २९९	ग्रामसीमासु च तथा,	कात्या., ४४३
गोप्रचारश्च रथ्या च,	कात्या., ६८०	ग्रामसीमासु बहिर्ये,	नार., ४४४
गोबीजकाञ्चनैर्वैश्ये,	नार., १३१	ग्रामादयश्च लिख्यन्ते,	कात्या., ३०२
,,	मनु., ,	ग्रामान्ते तु हतं द्रव्यं,	,, ५५३
,,	,, २५६	ग्रामेच्छाया गोप्रचारो,	याज्ञ., ४६१
गोब्राह्मणजिघांसा च,	बृह., ७७६	ग्रामेयकूकुलानां च,	मनु., ४४२
गोमिर्विनाशितं धान्यं,	उशना., ४६३	ग्रामे व्रजे विव्रीते वा,	नार., ५४५
गोमिस्तु भक्षितं सस्यं,	नार., ४६७	*ग्रामेषु नगरेषु च,	आप., ५५१

ग्रामेष्वन्वेषणं कुर्युः,  
ग्रामेष्वपि च ये केचित्,  
ग्रामो ग्रामस्य सामन्तः,  
ग्रामो देशश्च यः कुर्यात्,  
ग्रामोपान्ते च यत्क्षेत्रं,  
ग्रासाच्छादनमत्यन्तं,

”

ग्रासाच्छादनवासानां,  
ग्राहकं सर्वमेव स्यात्,  
ग्राहकस्य च यद्दोषात्,  
ग्राहकैर्गृह्यते चौरौ,  
ग्राह्यं स्याद्विगुणं द्रव्यं,  
ग्राह्यस्तूपनिधिः काले,  
ग्रीवा पादार्धसंदंश,  
ग्रीष्मे सलिलमित्युक्तं,  
ग्लहः प्रकाशः कर्तव्यो,

”

ग्लहे शक्तिवृद्धेस्तु,

घ

घातितेऽपहृते दोषो,  
घातयेद्विविधैर्दण्डैः,  
घृतेन योजितं श्लक्ष्णं,  
घृतेनाभ्यज्य गात्राणि,

च

चक्रवृद्धिं समारूढो,  
चक्रवृद्धिः कालवृद्धिः,  
चक्रवृद्धिस्तु शास्त्रेषु,  
चक्षुर्नासा च कर्णौ च,  
चण्डालादस्यतां प्राप्स्ये,  
\*चण्डालवैदेहक,  
\*चण्डालवैदेहक,  
चण्डालश्चपचानां तु,  
चण्डालाःपाण्डुसोपाकः,  
\*चण्डालानां बहिः,  
चण्डालानां वध्यघातः,

नार., ५४५  
मनु., ५४८  
कात्या., ४४७  
बृह., १५४  
नार., ४६२  
कात्या., ६६९  
मनु., ६६६  
कात्या., ६८७  
”, ५८०  
”, ३४३  
याज्ञ., ५४४  
कात्या., ३२८  
कात्या., ३४५  
बृह., ७८२  
नार., २०३  
बृह., ५२०  
”, ७६८  
याज्ञ., ७६४

याज्ञ., ५५२  
मनु., ५६८  
कात्या., २४२  
नार., ६३९

मनु., ३२८  
मनु., २८१  
नार., २८२  
मनु., ७८२  
मार्कण्डे. पु., ३८९  
विष्णु., ८१७  
”, ”  
मनु., ८३३  
मनु-विष्णु., ८२२  
विष्णु., ८३३  
यम., ८३१

\*चण्डालानामेकान्त,  
चण्डालेन तु सोपाको,  
चण्डालेनाननुज्ञातो,  
चण्डालो जायते शूद्रात्,  
चतस्रस्तु परित्याज्याः,  
चतुःशतेऽभियोगे तु,  
चतुःशालं स्यन्दनिकाः,  
चतुःसुवर्णिको निष्को,  
चतुरङ्गुलखातं तु,  
चतुरस्रा त्रिभिः स्थानैः,  
चतुरोऽशान् हरेद्विप्र,  
\*चतुरोऽशान् ब्राह्म,  
चतुरोऽशान् तथा मुख्यः,  
चतुर्गुणं वाष्टगुणं,  
चतुर्गुणोत्तमानां च,  
चतुर्णां करणादिषां,  
चतुर्णामपि चैतेषां,  
चतुर्णामपि वर्णानां,

”

चतुर्णामाश्रमाणां च,  
चतुर्थः संप्रदातैषां,  
चतुर्थं एकजातिस्तु,  
चतुर्थेन यदा दत्तं,  
चतुर्धा निर्णयः प्रोक्तः  
\*चतुर्विंशतिरेकनवतिः,  
चतुर्विंशतिराख्याता,  
चतुर्विंशावरः पूर्वैः,  
चतुर्विधः कर्मकरः,  
चतुर्विधः पूर्वपक्षः,  
चतुर्विधस्स्यादासेधः,  
चतुर्विधा सभा प्रोक्ता,  
चतुर्हस्ता तुला कार्या,  
चतुर्हितश्चतुर्व्यापी,  
चतुष्पथसुरस्थान,  
चतुष्पथाश्चैत्यवृक्षाः,  
चतुष्पदेष्वायं धर्मो,

श. लि., ८३३  
मनु-विष्णु., ८२२  
मार्कण्डे. पु., ३८९  
नार., ८१६  
वसि., ६१८  
बृह., १९९  
”, ४५३  
मनु., ८०८  
पिता., २५२  
नार., २१५  
मनु., ६९७  
विष्णु., ७००  
बृह., ३७१  
”, २७७  
”, २००  
नार., ४१  
मनु., ७८४  
नार., ४१  
मनु., ५८४  
”, ७९४  
”, ७४८  
”, ८११  
कात्या., ३१०  
बृह., ५९  
श. लि., ८०६  
नार., २२५  
”, ८०६  
”, ३८२  
बृह., ६९  
नार., ५२  
बृह., २६  
पिता., २१४  
नार., ४०  
नार., ४५४  
मनु., ५४५  
कात्या., १२३

चतुष्पादकृते दोषो,  
चतुष्पाद्वयवहारोऽयं,  
" "  
चतुष्प्रकारः प्रतिभूः,  
चतुष्प्रकारोऽभिहितः,  
चतुस्सुवर्णाः षण्णिष्काः,  
चतुस्सुवर्णान् षण्णिष्कान् ,  
\*चत्वारिंशता,  
चत्वारिंशत्पणो दण्डः,  
चत्वारि तु घटावीनि,  
\*चत्वारो वर्णाः,  
" "  
चन्द्रार्कसमकालीनं,  
चरञ्जलक्षितैर्वापि,  
चरित्रं पुस्तकरणं,  
चरित्रं पुस्तकरणे,  
चरित्रं बन्धककृतं,  
चेरयुः पृथिवीं दीनाः,  
चर्मकाष्ठेष्टकासूत्रं,  
चर्मचार्मिकभाण्डेषु,  
चर्मसस्यासवचूतं,  
चाटचौरभये बाधा,  
चाण्डालश्चपचादीनां,  
चातुर्वर्ण्यस्य या सूतिः  
चारा ह्युत्साहयेयुस्तान् ,  
चारितान्यतिजीर्णानि,  
चारैश्चानेकसंस्थानैः,  
चिकित्सा निर्णयश्चेति,  
चिन्तापनयनं चैव,  
चिरकालप्रोषितोऽपि,  
चिरकालोपभोगेऽपि  
चिरन्तनोपांशुकृते,  
चिरस्थाने द्वैगुण्यं,  
चिरावसत्रे दशमं,  
चीर्णाः पीताश्च ता गोपः,  
चेष्टाभोजनवाप्रोधे,

याज्ञ., ५०१  
नार., २६१  
" ४१  
बृह., ३०४  
" २५८  
बृह., ४२३  
मनु., ४२४  
गौत., ७८३  
याज्ञ., ५९९  
पिता., २१०  
आप., ८११  
देव., "  
व्यास., १५७  
कात्या., ५१३  
नार., ४१  
नार., २६०  
याज्ञ., २९९  
मनु., ७८४  
व्यास., ४३६  
मनु., ५५९  
कात्या., २९१  
बृह., ४२०  
कात्या., ८१०  
" "  
नार., ५४६  
पिता., २४०  
मनु., ५१०  
नार., ४५  
कात्या., १९४  
बृह., ७०७  
कात्या., १८३  
बृह., ९६  
गौत., २८८  
व्यास., ४६१  
नार., ४१४  
याज्ञ., ४८९

चैत्रो मार्गशिरश्चव,  
चैत्यद्रुमश्मशानेषु,  
" "  
चैत्यश्मशानसीमासु,  
चोदना प्रतिकालं च,  
चोदना प्रतिघाते तु,  
चोदने चोत्तमो दण्डः,  
चोरतः सलिलादग्नेः,  
चोराणां मुख्यभूतस्तु,  
चौरं प्रदाप्यापहतं,  
चौरदण्डेन तं पापं,  
चौरदण्डेन तं राजा,  
चौरहस्तान्नदीवेगात् ,  
\*चौरापहतं धनमवाप्य,  
चौरापहतविक्रीता,  
चौरेण वा परिक्षिप्तं,  
चौरैर्हृतं प्रयत्नेन,  
चौरैर्हृतं जलेनोदं,  
चौरोऽचौरः साध्वसाधुः,  
च्युतः स्वधर्मात्कुलिकः

पिता., २०३  
मनु., ८२९  
" ८३२  
याज्ञ., ५०३  
नार., १९३  
" १९४  
कात्या., ४८८  
" ३६१  
" ३७२  
याज्ञ., ५४०  
नार., १८५  
यम., १४  
कात्या., ६४७  
विष्णु., ५५३  
नार., ३९१  
कात्या., ५४७  
नार-कात्या., ५५३  
मनु., ३४२  
बृह., १५  
नार., १११

## छ

छद्मना कामयेद्यस्तु,  
छद्मना गृहमानीय,  
छद्मना याचितं चार्थं,  
छदिमूत्रपुरीषाद्यैः,  
छलं निरस्य भूतेन,  
\*छागवृषभा अनिर्दशाहा,  
छायानिर्वेशिनो रक्ष्यो,  
छित्वा तु यज्ञियं वृक्षं,  
छित्वा लिङ्गं वधस्तस्य,  
छिन्द्यात्तत्तन्पुस्तस्य,  
छिन्ननासौष्ठवार्णौ तु,  
छिन्ननास्येन यानेन,  
छिन्ननास्ये मिश्रयुगे,  
छिन्नभोगे गृहक्षेत्रे,  
छेत्तव्यं तत्तदेवास्य.

बृह., ५८५  
" ६७७  
" ३२५  
कात्या., ४८६  
याज्ञ., १७  
श. लि., ४६८  
नार., २४३  
पिता., २१४  
याज्ञ., ५८७  
कात्या., ५३७  
बृह., ५९३  
याज्ञ., ५०२  
मनु., ५०१  
बृह., १९२  
मनु., ४९१

छेदने चैव यन्त्राणां,  
छेदने चोत्तमं दद्यात्,  
छेदवर्जप्रणयनं,

ज

जगत्सर्वमिदं हन्यात्,  
जघन्यं सेवमानानां,  
जघन्यकर्मभाजस्तु,  
जघन्यजाश्च ये तेषां,

जघन्यासनशायित्वं,  
जघन्यास्तेऽपि प्रत्येकं,  
जङ्गमं स्थावरं बन्धं,  
जङ्गमं स्थावरं हैमं,  
जङ्गमः स्थावरश्चैव,

\*जडह्रीबौ भ,  
जडातिवृद्धा बालाश्च,  
जनन्यां संस्थितायां तु,

जनापरक्तिर्भवति,  
जन्मकर्मश्रुतोपेता,  
जन्मज्येष्ठेन चाह्वानं,

जन्मनामपरिज्ञाने,  
जन्मप्रभृति यत्किञ्चित्,  
जन्मविद्यागुणज्येष्ठो,

जयपत्रं ततो दद्यात्,  
जातद्रुमाणां द्विगुणो,  
जाता जनिष्यमाणाश्च,

जातिः संज्ञा निवासश्च,  
जातिकर्मकृतस्तूक्तो,  
जातिजानपदानर्थान्,

जातिभ्रंशकरस्याभ,  
जातिभ्रंशकरी वाथ,  
जातिनामामिलिखितं,

जातिमात्रोपजीवी वा,  
जातिर्वर्णानुलोभ्येन,  
जातिशुद्धाः कर्मशुद्धाः,

जातिसस्यात्तथा क्षीरात्  
जातिसस्याग्निभागं तु,

मनु., ५०१  
कात्या., ८०२  
मनु., ४८२

यम., ७८३  
मनु., ५९७  
नार., ३८६  
बृह., ७०५

,, ६२०  
नार., ४४६  
बृह., १५४  
,, ७४६

,, २९२  
गौत., ६६९  
बृह., ७३

मनु., ६८८  
बृह., २०  
विष्णु., २८

मनु., ६६०  
बृह., ७०७  
मनु-नार., १३१

बृह., ६६२  
व्यास., २६६  
याज्ञ., ५०३

बृह., ७०७  
कात्या., ६०  
नार., ३८३

मनु., १९  
विष्णु., ५३४  
कात्या., ४७२

बृह., ९९  
मनु., २९  
लक्ष्मी., ६

बृह., ७१७  
,, ३८६  
,, ४०२

जातो नार्यामनार्यायाम्,  
जातोऽपि दास्यां शूद्रेण,  
जायतेऽम्बष्ठः शूद्रायां,

जात्युत्कर्षो युगे ज्ञेयः,  
जात्यैव लोहकारो यः,  
जानीयादस्थिरां वाचम्,

जितमुद्राहयेज्जेले,  
जिह्वां त्यजेयुर्निर्लभं,  
\*जिह्वाच्छेदनं शु,

\*जीवति क्षेत्रज्ञ,  
जीवतोर्न स्वतन्त्रः स्यात्,  
जीव दानादिकर्मन्त्रैः,

\*जीवज्ञेय वा प्रवि,  
\*जीवसंजीवकर,  
जेतुर्दद्यात्स्वयं द्रव्यं,

ज्ञातं मयेति लिखितं,  
ज्ञातिभिर्भागलेख्येन,  
ज्ञातिसंबन्धसुहृदाम्,

ज्ञातिसंबन्धमिस्त्वेते,  
ज्ञात्वा द्रव्यवियोगं तु,  
ज्ञात्वा निसृष्टं यत्प्रीत्या,

ज्ञात्वामियोगं येऽपि स्युः,  
ज्ञात्वा संख्यां सुवर्णस्य,  
ज्ञात्वा सम्यग्धनं हत्वा,

ज्ञात्वैताननृते दोषान्,  
ज्येष्ठं वा श्रेष्ठभागेन,  
ज्येष्ठः कुलं वर्धयति,

ज्येष्ठः पूज्यतमो लोके,  
ज्येष्ठ एव तु गृहीयात्,  
ज्येष्ठपुत्रप्रसूतस्य,

ज्येष्ठश्चैव कनिष्ठश्च,  
ज्येष्ठस्तु जातो ज्येष्ठायां,  
ज्येष्ठस्य विंश उद्धारः,

\*ज्येष्ठांशहीन,  
ज्येष्ठायांशोऽधिको देयः,  
ज्येष्ठेन जातमात्रेण.  
ज्येष्ठे मासि नयेदेनां,

मनु., ८२४  
याज्ञ., ७०५  
,, ८१३  
,, ८२५

नार., २२७  
मनु., ११९  
याज्ञ., ७६५  
,, ३६१, ३६४

आप., ४८०  
हारी., ७२३  
नार., २७५  
बृह., २५४

हारी., ६५३  
बौधा., ८२५  
कात्या., ७६४  
व्यास., १५८

नार., ७५८  
बृह., ३६९  
मनु., ७८५  
कात्या., ३४३

,, ६८६  
,, ५६  
वृद्धकात्या., २०२  
बृह., ५७१

नार., १३४  
याज्ञ., ६५४  
मनु., ६५०  
,, ६५०

,, ६४९  
श. लि. ७४२  
मनु., ६५६  
,, ६५८

,, ६५५  
गौत., ७०१  
नार., ६६१  
मनु., ६५०

,, ४३९

ज्योतिर्ज्ञानं तथोत्पातम्,  
ज्वरातिसारविस्फोटः,  
शूलो मल्लश्च राजन्यात्,

त

तं तं दृष्ट्वा स्वतो मार्गात्,  
तं देशकालौ शक्तिं च,  
तं प्रदायाप्याकृष्टशतं,  
तं प्रवक्ष्यामि तत्त्वेन,  
तं राजा निर्धनं कृत्वा,  
तं राजा प्रणयन् सम्यक्,  
तं वै पुनाति सा नारी,  
तं शुश्रूषेत जीवन्तं,  
तं समीक्ष्य यथान्यायं,  
त एव तत्र द्रष्टारः,  
तच्छेषमाप्नुयात्तस्मात्,  
तज्ज्ञेयं क्षेत्रिकस्यैव,  
तडागभेदकं हन्यात्,  
तडागान्युदपानानि,  
तडागोद्यानतीर्थानि,  
तण्डुलान् कारयेच्छुक्लान्,  
तण्डुलान् भक्षयित्वा तु,  
तण्डुलानां प्रवक्ष्यामि,  
तण्डुलाश्चैव कोशश्च,  
तण्डुलैर्न नियुज्जीत,  
ततः कुम्भातिपण्डमेकं,  
ततः पौगण्डबालानां,  
ततः प्रभृति वक्तव्यः,  
ततः सत्रात्याः सर्वेषां,  
ततः सममुपादाय,  
ततः स्वमातृतः ज्येष्ठाः  
\*ततश्च कृष्ण,  
\*ततस्तत्राग्निवर्णं,  
ततस्तद्वस्तयोः प्रास्येन्,  
ततस्तद्वचनाद्वच्छेत्,  
ततस्तस्य पलाशानि,  
ततो दायमपुत्रस्य,

बृह., ५२२  
कात्या., २४८  
मनु., ८२६  
नार., ७७५  
मनु., ७७९  
याज्ञ., ४६०  
पिता., २०३  
मनु., ५६५  
,, ७९५  
अत्रिरा., ६३३  
मनु., ६२८  
कात्या., ६५  
नार., ७६८  
बृद्धमनु., ५५४  
मनु., ७३९  
,, ५६६  
,, ४४०  
कात्या., ४५५  
पिता., २५०  
,, २५०  
,, २५०  
,, २०९  
कात्या., २०६  
बृह., २५४  
,, ४४१  
नार., ३९३  
,, ७५१  
पिता., २३०  
मनु., ६५८  
विष्णु., २५५  
,, २३०  
पिता., २३२  
नार., ६४०  
पिता., २२६  
देव., ७४९

ततो दुर्गं च राष्ट्रं च,  
ततो निषादाच्छूद्रायां,  
ततोऽन्यं दापयेत्पूर्वं,  
ततोऽपरेऽज्येष्ठवृषाः,  
ततोऽर्थं लेखयेत् सद्यः,  
ततोऽर्थं मध्यमस्य स्यात्,  
ततोऽर्थदण्डो भृत्यानां,  
ततो लमेत यत्किञ्चित्,  
ततो विंशतिवर्षाणि,  
तत्कारिणो नार्थदमैः  
तत्कालकृतमूल्यो वा,  
तत्कालावधिसंयुक्तं,  
तत्कुसीदमिति ज्ञेयं,  
तत्कृतं स्यात्कृतं कार्यं,  
तत्कृताचारभेत्तृणां,  
तत्तत्कार्यं निवर्तितं,  
तत्तथा स्थापयेद्राजा,  
तत्तदेवास्य छेत्तव्यम्,  
तत्तस्माद्ग्रहणं तस्य,  
तत्तुल्यः पुत्रिकापुत्रो,  
तत्तुल्या पुत्रिका प्रोक्ता,  
तत्ते सर्वं शुनो गच्छेत्,  
तत्पत्रमुपधादुष्टैः,  
तत्पापमतिवृद्धं हि,  
\*तत्पावनायकूष्माण्डीभिः,  
तत्पावनाय निर्वाप्यः,  
तत्पिण्डदाः श्रोत्रिया ये,  
तत्पुत्राः पितृदायांश्च,  
तत्पुत्राः विषमसमाः,  
तत्पुनस्त्रिविधं प्रोक्तं,  
,,  
तत्प्रदेशसमासज्ञं,  
तत्प्रदेशानुमानैश्च,  
तत्प्रमाणं तु कर्तव्यं,  
,,  
तत्प्रमाणं स्मृतं लेख्यं,  
तत्प्रमाणं स्मृतं सर्वं,

मनु., ७९५  
देव., ८२०  
कात्या., १९४  
मनु., ६५८  
याज्ञ., ९१  
मनु., ६५५  
,, ५३२  
बृह., ४२७  
कात्या., १७०  
बृह., ५७१  
याज्ञ., २९६  
बृह., २९९  
नार., २७७  
,, २७३  
कात्या., ७६९  
मनु-विष्णु., २७०  
मनु., ४४५  
नार., ५३८  
कात्या., ५८१  
देव., ७२५  
बृह., ७०८  
मनु., १३१  
कात्या., १६३  
हारी., ५१२  
विष्णु., १४७  
याज्ञ., १४७  
बृह., ६६६  
देव., ६६८  
बृह., ६६२  
नार., ५५६  
बृह., ५७७  
याज्ञ., ५७५  
नार., ४४१  
बृह., १९२  
,, ४४७  
नार., १६१  
याज्ञ., १६१

तत्प्रवर्तितमन्यैश्च,  
 तत्प्राज्ञेन विनीतेन,  
 तत्र कर्म च यत्कुर्यात्,  
 तत्र कार्पासिकोर्णानां,  
 तत्र कार्यं परिज्ञाय,  
 तत्र कालेन जायन्ते,  
 तत्र कालो भवेत्पुंसां,  
 \*तत्र च ब्राह्मणीसुत,  
 \*तत्र चेदनु प्राप्ते,  
 तत्र जाताः समांशाः स्युः,  
 तत्र जात्यन्तरालानां.  
 तत्र ज्येष्ठतरो यः स्यात्,  
 तत्र तु स्वामिनश्छन्दो,  
 तत्र धर्मो ह्यधर्मेण,  
 तत्र पूर्वश्चतुर्वर्गो,  
 \*तत्र ब्राह्मणात्.  
 तत्र भेदमुपेक्षां वा,  
 तत्र मूलं दर्शनीयं,  
 तत्र यद्वक्तव्यं जातं स्यात्,  
 तत्र राजमूला व्यवहाराः  
 तत्र राजाज्ञया संधिः,  
 तत्र राजाभिषेकानां,  
 तत्र राज्ञां भवेद्दण्डः,  
 तत्रर्णां नाप्नुयाद्वन्धम्,  
 तत्र लब्धं तु यत्किञ्चित्,  
 तत्र वक्तव्यमनुते,  
 तत्र वै त्रायते यस्मात्,  
 \*तत्र वैश्यापुत्रः,  
 \*तत्र शूद्रे द्वादशाहः  
 तत्र सत्यं ब्रुवन्साक्षी,  
 तत्र सत्यं हतं सभ्यैः,  
 तत्र सत्ये स्थितो धर्मः,  
 तत्र सत्ये स्थितो धर्मो,  
 \*तत्र सवर्णायामेव,  
 तत्र सा भर्तृपरमा,  
 ”  
 तत्र स्यात्सदृशं स्वाम्यं,

बृह., ७६३  
 मनु., ७३७  
 नार., ३८४  
 ,, ५२५  
 उशना., ४८४  
 मनु., ७१७  
 कात्या., ६५  
 विष्णु., ६९९  
 श. लि., ३६३  
 मनु., ७०१  
 देव., ८३३  
 यम., ७१८  
 याज्ञ., ४०१  
 कात्या., ३६  
 नार., ३८८  
 श. लि., ८१४  
 बृह., ४२३  
 बृह., ३५०  
 मनु., ७४५  
 श. लि., १३९  
 बृह., ८५  
 नार., २४९  
 मनु., ७९९  
 बृह., २९९  
 कात्या., ६७८  
 मनु., १४६  
 हारी., ७४१  
 विष्णु., ८१७  
 ऋष्यशृङ्ग., ६७९  
 मनु., १३७  
 कात्या., ३६  
 नार., ४१  
 ,, २६०  
 उशना., ८१४  
 अङ्गि., ६३३  
 व्यास., ६३४  
 याज्ञ., ६५२

तत्र स्वमाददीत स्त्री.,  
 तत्र स्वामी भवेद्दण्डयो,  
 तत्रान्यं दापयेद्वन्धं,  
 तत्रापरिवृत्तं धान्यं,  
 तत्रापि नाप्नुयात्कामम्,  
 तत्रापि नाशुभं किञ्चित्,  
 तत्रापि स दण्ड्यः स भवेत्,  
 तत्रापि दृष्टं त्रैविध्यं,  
 तत्राभियोक्ता प्राग्ब्रूयात्,  
 \*तत्राम्बष्ठोग्रसंयोगे,  
 तत्रासीनः स्थितो,  
 तत्रेहाष्टावदेयानि,  
 \*तत्रैकस्मिन् शिक्ये पूरुषं,  
 तत्रैतद्दापयेद्द्विभ्यं,  
 तत्रैव लोकपालांश्च,  
 तत्रोपशयनं कार्यं,  
 तत्संभूय समुत्थानं,  
 \*तत्संशयाच्चोपयच्छेत्,  
 तत्सत्यं वद कल्याणि,  
 ” ” ”  
 तत्सपिण्डा बान्धवाश्च,  
 तत्सपिण्डेषु चास्तु.,  
 तत्समस्तु पुनस्तौल्ये,  
 तत्समुत्थेषु कार्येषु,  
 तत्समुत्थो हि लोकस्य,  
 तत्सर्वं तस्य जानीहि,  
 तत्सर्वं नाशमायाति,  
 तत्साध्यं साधनं येन,  
 तत्साम्ये गुणिनो ग्राह्यं,  
 तत्साहसमिति प्रोक्तं,  
 तत्सिद्धौ सिद्धिमाप्नोति,  
 तत्सुतो गोत्रजो बन्धुः,  
 तत्सुतो भुक्तिमेवैकां,  
 तत्सुतो वा धनं तासां,  
 तत्सुतो भुक्तिदोषांस्तु,  
 तत्सोपाधिबलात्,  
 तत्स्त्रीणां जीवनं दद्यात्,

कात्या., ६८७  
 मनु., ५०२  
 बृह., २९५  
 मनु., ४६२  
 नार., ७६६  
 कात्या., ३९६  
 नार., ३४४  
 ,, ४८५  
 कात्या., ५८  
 बौधा., ८१८  
 मनु., ७  
 नार., ३७३  
 विष्णु., २१७  
 कालिका.पु., २१७  
 पिता., २१६  
 बृह., ४२०  
 नार., ३५८  
 गौत., ७२७  
 याज्ञ., २१८  
 कालिका.पु., २२१  
 बृह., ७४६  
 नार., ६०४  
 बृह., २२३  
 नार., ४१०  
 मनु., ५८४  
 याज्ञ., १३५  
 बृह., १२६  
 कात्या., ९०  
 नार., १४८  
 ,, ५५६  
 याज्ञ., ९१  
 ,, ७५०  
 बृह., १८३  
 ,, ६९३  
 कात्या., १६५  
 बृह., १६३  
 नार., ७५१

तत्स्त्रीणामुपभोक्ता तु,	कात्या.,	३२०	तथैव ते पालनीयाः,	,,	२०
तत्स्यात्पालयितो न्यासं,	बृह.,	३४०	,,	,,	६५५
तत्स्वयं नृपतिः कुर्यात्,	मनु.,	२६९	तथैव दण्डपारुष्ये,	कात्या.,	४९२
तत्स्वहस्तकृतैरन्यैः,	कात्या.,	१६८	तथैव भोज्यवैभाज्यात्,	,,	४२८
तत्स्वहस्तक्रियाचिह्नं,	नार.,	१६७	तथैव मागधो वैश्यात्,	देव.,	८१७
तत्स्वहस्तादिमिस्तेषां,	कात्या.,	१६८	तथैवाक्षेत्रिणो बीजं,	मनु.,	७३८
तत्स्वामिना पणो देयो,	बृह.,	७६६	तथोत्क्रोच परीहास,	नार.,	३७८
तथा कुठारहस्तश्च,	नार.,	१९५	तथोपनिधिहर्तारं,	मनु.,	३४५
तथा चान्ये प्रणिहिताः	,,	५४६	तथ्ये तथ्यं प्रयुञ्जीत,	बृह.,	६९
तथा तं च निबध्नीयात्,	मनु.,	४४२	तथ्येनापि ब्रुवन्दाप्यो,	मनु-नार.,	४७५
तथा तथा दमः कार्यो,	,,	५०३	तदङ्गं तस्य छेतव्यं,	नार.,	४९०
तथा तुष्टिकरं देयं,	कात्या.,	४९३	तदङ्गच्छेद इत्युक्तो,	,,	५५८
तथा तु स्यात्प्रमाणं तत्,	,,	१६२	तदधीनकुडुम्बिन्यः,	कात्या.,	५५
तथा दण्डं नियुञ्जीत,	,,	७९७	तदङ्गं द्विगुणं दाप्यो,	मनु.,	५६२
तथा दासकृतं कार्यं,	नार.,	२७२	तदन्यत्कारयेल्लेख्यं,	कात्या.,	१६२
तथा दोषाः प्रयोक्तव्याः..	कात्या.,	१६५	तदन्वयस्यागतस्य,	बृह.,	७०७
तथा धरिममेयानां	मनु.,	५३३	तदपत्यं द्रयोरेव,	नार.,	७२२
तथा धेनुभृतः क्षीरं,	बृह.,	४१४	*तदपत्यस्य धनं,	श.लि.,	७२६
तथा नाथ दरिद्राणां,	,,	४२३	तदपि त्रिविधं प्रोक्तं,	नार.,	५०६
तथा नित्यं यतेयातां,	मनु.,	६१४	*तदपेक्षस्तद्वृत्तिः,	गौत.,	७८३
तथान्यहस्ते विक्रीय,	नार.,	४३२	तदप्यकृतमेवाहुः,	नार.,	२७२
तथा पान्थमुषो वृक्षे,	बृह.,	५२८	तदप्यनुक्तं विज्ञेयं,	,,	१५१
तथा पिता कुपुत्रैस्तु,	,,	७४३	तदप्याम्नायविहिते,	नार-कात्या.,	११
तथा बाह्यतरं बाह्यः,	मनु-विष्णु.,	८२१	तदप्रमाणं लिखितं,	नार.,	१६३
तथा राजा द्वयोः सीमां,	नार.,	४४९	तदभावे तु चिह्नस्य,	कात्या.,	१३६
तथारूढविवादस्य,	,,	१८४	तदभावे तु जननी,	याज्ञ.,	६६४
तथार्याज्जात आर्यायां,	मनु.,	८२४	तदभावे तु तनयाः,	बृह.,	६५३
तथालेख्यस्य बिम्बानि,	कात्या.,	१६६	तदभावे तु मूल्यं स्यात्,	नार-कात्या.,	५५३
तथा शक्तः प्रतिभुवं,	याज्ञ.,	४७७	*तदभावे दुहितृगामि,	,,	७५०
तथा शौर्यापदेशैश्च,	नार.,	५४६	*तदभावे पिता,	बौधा.,	७५१
तथाष्टगुणमन्यस्मिन्,	,,	२८५	*तदभावे पितृ,	विष्णु.,	७५०
तथाहि श्रुतयो बह्व्यो,	मनु.,	६०५	*तदभावे बन्धु,	,,	,,
तथैकादशपुत्रास्तु,	बृह.,	७३५	*तदभावे ब्राह्म,	,,	,,
तथैव कन्या व्यावृत्ता,	यम.,	६३८	*तदभावे भवेन्मातुः,	बौधा.,	६९२
तथैव चतुरो वर्णान्,	देव.,	८३३	तदभावे भ्रातरस्तु,	बृह.,	७५०
तथैव तत्सुतोऽपीष्टे,	बृह.,	७२५	*तदभावे भ्रातृ,	विष्णु.,	,,
तथैव तस्य दातव्यं,	,,	३४१	*तदभावे भ्रातृपुत्र,	,,	,,





तन्मूल्याद्विगुणो दण्डः,  
तन्मे रेतः पिता बृह्णा,  
तन्मोक्षणार्थं यद्दत्तं,  
तपश्चैवाग्निहोत्रं च,  
तपसा चेज्यया चैव,  
तपस्विनां तु कार्याणि,  
तपस्वी चाग्निहोत्री च,  
तपोज्ञानसमायुक्ताः,  
तपोबीज प्रभावैश्च,  
तप्तमाषस्य वक्ष्यामि,  
तप्तमासादयेत्तैलं,  
तमनेन विधानेन,  
तमशुद्धं विजानीयात्,  
तमुपनयेत्षष्ठं,  
तमेव साधयेद्राजा,  
तमौरसं विजानीयात्,  
तया गवा किं क्रियते,  
तया प्राप्तं च विधिना,  
तयोः पूर्वतरं ग्राह्यं,  
तयोः पैतामहं सर्वं,  
तयोरतिक्रमे धर्म्यं,  
तयोरपत्ययोर्वेद्ये,  
तयोरपि पिता श्रेयान्,  
\*तयोरभावे त्रया,  
तयोरुक्ते सदस्यास्तु,  
तयोर्नित्यं प्रतीघाते,  
तयोर्यद्यस्य पित्र्यं स्यात्,  
तयोर्हि मातापितरौ,  
\*तयोश्चतुर्विधस्य,  
तरिकः स्थलजं शुल्कं,  
\*तरिकश्च स्थलशुल्कं,  
तरेष्वशुल्कदानं च,  
तलवद्दृश्यते व्याम,  
तवाहमिति चात्मानं,  
तवाहमित्युपगतः,  
तवाहमित्युपगता,  
तवाहमित्युपगतो,

याज्ञ., ५५८  
मनु., ६०५  
कात्या., ३७२  
नार., ३१३  
हारी., ७८३  
ब्रह्म-कात्या., ३२  
नार., ३१३  
बृह., ६४३  
मनु., ८२४  
पिता., २५२  
मनु-नार., ४८१  
मनु., ४३१  
विष्णु., २४७  
बौधा., ८२५  
बृह., ५१  
मनु., ७१९  
बृह., ६६६  
कात्या., ६७७  
,, ३०१  
बृह., ३०९  
कात्या., ५४  
महाभा., ६१८  
नार., २७५  
श. लि., ७१२  
कात्या., ५८  
मनु., ७६२  
,, ७४५  
देव., ७२५  
गौत., ७७७  
याज्ञ., ५६३  
विष्णु., ७९०  
नार., ८०३  
,, १६  
,, ३९०  
,, ३८८  
,, ६४५  
,, ३९१

तस्करप्रतिनिषेधार्थं,  
तस्मात्कुलगणाध्यक्षा,  
तस्माच्छास्त्रानुसारेण,  
तस्मात्तत्संप्रवर्तत,  
तस्मात्तस्य वधं राजा,  
\*तस्मानु संशयाज्ञेहो,  
तस्मात्ते नाक्षिपेद्राजा,  
तस्मात्पुत्र इति प्रोक्तः,  
तस्मात्पौराणिकान् धर्मान्,  
तस्मात्प्रजाविशुद्धयर्थं,  
तस्मात्प्रत्यक्षदष्टोऽपि,  
तस्मात्संशयमूढानां,  
तस्मात्सत्यं हि वक्तव्यं,  
तस्मात्सत्येन भगवन्,  
तस्मात्सर्वेषु कार्येषु,  
तस्मात्साधारणो धर्मः,  
तस्मादपोह्यमन्यार्थं,  
तस्मादर्थश्च धर्मश्च,  
तस्मादर्थतः स हीयेत,  
तस्मादवहितो राजा,  
तस्मादव्याहताः पापाः,  
तस्मादस्य वधं राजा,  
तस्मादेता सदाभ्यर्च्यार्थं,  
तस्मादेवंविधं पौत्रैः,  
तस्माद्दासाच्च दास्याश्च,  
तस्माद्देशे च काले च,  
तस्माद्धर्मो न हन्तव्यो,  
तस्माद्द्विजेभ्यो दत्त्वाऽर्धम्,  
तस्माद्द्यूतं न सेवेत्,  
तस्माद्ब्राह्मणमः कार्यो,  
\*तस्माद्ब्राह्मणोऽनाद्यः,  
तस्माद्यत्नेन कर्तव्यं,  
,,  
तस्माद्यम इव स्वामी,  
\*तस्माद्रक्षेद्भार्या सवैतः,  
तस्माद्राजा निवर्तत,  
तस्माद्राजा ब्राह्मणस्वं,

मनु., ५४६  
बृह., ८५  
कात्या., १८  
,, २३  
यम., ७८३  
श. लि., ७२४  
नार., ४६०  
मनु-विष्णु., ७४१  
यम., ७७६  
मनु., ६०७  
नार., १६  
बृह., ३३  
मनु., १२५  
नार., २३७  
बृह., ४५०  
मनु., ६११  
नार., ६३  
कात्या., १०  
,, ३३०  
यम., १०  
कात्या., ७९८  
मनु., ७८३  
,, ६१०  
कात्या., ३०९  
ब्रह्मपु., ७३६  
नार., ४९४  
मनु., ३७  
,, ७९३  
,, ७६२  
कात्या., २८  
वसि., ७८४  
बृह., ८३  
,, १८८  
मनु., ११  
पैठी., ६०३  
कात्या., ७६३  
बौधा., ७५२

तस्माद्राज्ञा विशेषेण,	नार.,	८२८	तस्य वेश्यावदिच्छन्ति,	व्यास.,	५९८
तस्मान्न देवाः श्रेयांसं,	मनु ,	१३२	तस्य व्यवहारो वेदो,	गौत.,	१२
तस्मान्न मिथ्याशपथं,	यम.,	२५७	तस्य सर्वाणि भूतानि,	मनु.,	७९४
तस्मान्न लेख्यसामर्थ्यात् ,	व्यास बृह.,	१६६	तस्य सीदति तद्राष्ट्रं,	,,	२९
*तस्मान्नाधनाज्ञा,	श.लि.,	८००	तस्यां पौनर्भवो जातो,	कात्या.,	७२७
तस्मान्नित्यं यतेद्राजा,	महाभा.,	१६	तस्यांशं दशमं दत्वा,	बृह.,	३६०
तस्मान्न्यायेन राष्ट्रं तु,	कात्या.,	१०	तस्यांशो दशमो दाप्यः,	कात्या.,	३६१
तस्मिंश्चेद्वाप्यमानानां,	बृद्धमनु.,	५५४	*तस्यां हि पितामहा,	श. लि.,	७२०
तस्मिन्कर्मणि तुष्टेन,	कात्या.,	६७८	तस्या ऋणं हरेत्सर्वं,	नार.,	३२३
तस्मिन्देष्टे निषीदन्ति,	मनु.,	२७	तस्याद्वीत षड्भागं,	मनु.,	७९१
तस्मिन्नपि प्रसिद्धेऽर्थे,	कात्या.,	३७९	तस्या धर्माः समुद्दिष्टा	कात्या.,	८१०
तस्मिन्नष्टे हृते वापि,	,,	३४८	तस्यानुरूपमूल्यं वा,	,,	५०३
तस्मिन्नेव कृते कदये,	नार.,	२२१	तस्याप्येव विधिर्दृष्टः,	नार.,	३४८
तस्मिन्प्रेते न वाच्योऽसौ,	वि-का.,	१७८	तस्याप्येषो विधिर्दृष्टो	,,	६७६
तस्मिन् भोगः प्रयोक्तव्यः,	कात्या.,	४४२	*तस्याभावे क्षेत्रज,	श.लि.,	७१२
तस्य कर्मानुरूपेण,	मनु ,	३६४	तस्यामरोचमानायां,	मनु.,	६१३
तस्य कार्यं न सिध्येत्तु,	बृह.,	१२१	तस्यामात्मनि तिष्ठन्त्यां,	नार.,मनु.,	७४७
तस्य कुर्यान्नृपो दण्डं,	कात्या.,	५६	तस्यार्थमभियुक्तस्य,	पिता.,	२१९
*तस्य गोमिथुनं,	श. लि.,	७०४	तस्यार्थिवादो दातव्य,	नार.,	५९
*तस्य चेच्छास्त्रम्,	आप.,	७७७	तस्याशुकल्प्ये अङ्गुल्यौ,	मनु.,	५९७
तस्य तत्सिद्धिमाप्नोति,	बृह.,	१७७	तस्यास्तु साधनं लेख्यं,	कात्या.,	९४
तस्य तद्वर्धते नित्यं,	मनु.,	५११	तस्याहुः संप्रणेतारम् ,	मनु.,	७९४
तस्य तन्नापहर्तव्यम्,	व्यास.,	६७६	तस्येत्युक्तवतो लोहं,	याज्ञ.,	२२४
तस्य तेभ्यो न साक्ष्यं स्यात्,	नार.,	१११	तस्येह भागिनौ तौ तु,	कात्या.,	७२२
तस्य दण्डः क्रियापेक्षः,	,,	१५८	तस्येह भागिनौ दृष्टौ,	मनु.,	७२२
तस्य दण्डविकल्पः स्यात्,	मनु.,	७६२	तस्यैकस्य न सर्वस्य,	कात्या.,	२४७
तस्य दण्डविशेषास्तु,	,,	१४१	तस्यैकस्य न सर्वस्य,	पिता.,	२४७
तस्य दण्डो भवेद्राज्ञः,	मत्स्यपु.,	४०९	तस्यैवं मुक्तपिण्डस्य,	नार.,	२३२
तस्य दोषाः प्रयोक्तव्याः,	कात्या.,	१७१	तस्यैव भेदः स्तेयं स्यात् ,	,,	५५६
तस्य दोषेण यत्किञ्चित्,	,,	३४४	तस्यैव भेदस्स्यात् स्तेयं,	,,	५०५
तस्य प्रक्षुभ्यते राष्ट्रं,	बृह.,	५७१	तस्यैव वा विधानस्य,	मनु.,	७९१
,,	मनु.,	५१२	तस्यैवाचरणं पूर्वं,	कात्या.,	४२३
,,	व्यास.,	२९	तस्यैष व्यभिचारस्य,	मनु.,	६०५
*तस्य प्रदानानि,	वसि.,	७३१	तस्योरुं प्रतिगृह्णाथ,	नार.,	२३६
तस्य भाण्डं दर्शनीयं,	बृह.,	३६२	तां ग्राममध्ये विख्याप्य,	यम.,	६१७
तस्य वर्षशते पूर्णं,	नार.,	१२७	तां तु विख्याप्य बन्धूनां,	,,	६१७
तस्य वा तत्समर्प्यं स्यात्,	कात्या.,	५८	तां दृष्ट्वा निर्णयं कुर्यात् ,	बृह.,	२२

तांश्च देवाः प्रपश्यन्ति,	मनु ,	१२५	तावुभौ चौरवच्छास्यौ,	,,	३४५
तां श्वमिः खादयेद्राजा,	यम.,	५९२	,,	मत्स्यपु.,	,,
,,	मनु.,	५९३	तावुभौ ब्रह्मचण्डालौ,	यम.,	८२७
तां साध्वीं विभृयाञ्जित्यं	,,	६११	तावुभौ विद्धि चण्डालौ,	अङ्गिरा.,	,,
ताञ्छिष्याच्चोरदण्डेन,	,,	६८५	तासां चैवावरुद्धानां,	मनु-नार.,	४१७
ताडनं बन्धनं चैव,	कात्या.,	८००	*तासां तु लोकाः पतिभिः समान, वसि.,		६३०
तादृग्गुणा सा भवति,	मनु.,	६०९	तासां पूत्रेषु जातेषु,	मनु.,	६९६
तादग्नोहति तत्तरिमन्,	,,	७३७	तासां प्रभावस्तमितं गते के,	अङ्गिरा.,	६३३
तादृशान् संप्रवक्ष्यामि,	,,	१०४	तासां वर्णक्रमेणैव,	मनु ,	६११
ता द्वादशसुवर्णस्तु,	बृह.,	८०८	तिर्यग्योनौ तु गोवर्जं	मत्स्यपु.,	५९९
ताननन्तरनाम्नस्तु,	मनु.,	८१३	तिष्ठति द्विगुणा वृद्धिः,	कात्या.,	२८८
तानप्याह्वानयेद्राजा,	कात्या.,	५६	तिष्ठ तिष्ठेति वा ब्रूयात्,	नार.,	५७९
तानि कृत्याहतानीव,	मनु.,	६१०	तिष्ठते विवशो दीनो,	व्यास.,	६३४
तानि निर्हरतो लोभात्,	,,	५१६	तिष्ठेद्भर्तृगृहे यातु,	कात्या.,	६८८
तानि सन्धिषु सीमायां,	,,	४४७	*तिष्ठः पुनर्भवेत्ततः स्वरिण्यः,	श.लि.,	६४६
तान्तवस्य तु संस्कारे,	नार.,	५२५	तीरितं चातुष्ठितं च,	नार.,	२६७
तान्येव पुनरालक्षेत्,	,,	२२६	,,	मनु.,	,,
तान्विदित्वा तु कुशलैः,	,,	५१०	*तुलमानप्रतिमान,	श.लि.,	८००
तान्विदित्वा तु चरितैः,	मनु.	५१०	तुलयित्वा नरं पूर्वं,	नार.,	२१८
तान् सर्वान् घातयेद्राजा,	,,	७६२	,,	पिता.,	२१९
तान् सर्वान् समवाप्नोति,	याज्ञ.,	१२५	तुलयित्वा शरत्काले,	नार.,	२४०
तान् सावित्रीपरिभ्रष्टान्,	मनु.,	८२६	तुलाग्न्यापो विषं कोशो,	याज्ञ.,	२०९
तापयित्वा ततः पश्चात्,	पिता.,	२२८	तुलाधारिममेयानां,	नार.,	५३३
ताम्रं पञ्चपलं विद्यात्,	नार.,	५२४	तुलाधारणविद्वद्भ्यः,	याज्ञ.,	२१८
ताम्रकर्षकृता मुद्रा,	बृह.,	८०८	तुलाधारस्य ते लोकाः,	विष्णु.,	२२०
ताम्रपट्टे पटे वाऽपि,	व्यास.,	१५७	*तुलानाणककूटकतुश्च,	,,	५१५
ताम्ररौप्यसुवर्णानां,	मनु.,	८०७	तुलामानं प्रतीमानं,	मनु.,	५१७
तारयिष्यन्ति किं वास्मान्,	नार.,	१३४	तुलामानप्रतीमान,	कात्या.,	५१३
ता राजसर्षपस्तिष्ठः,	मनु.,	८०७	*तुलामानप्रतीमानव्यवहार,	श. लि.,	५१७
तालज्ञो लभतेऽध्यर्धं,	बृह.,	३७१	तुलामानविशेषेण,	व्यास.,	५१२
तावतः संख्यया यस्मिन्,	मनु-नार.,	१३२	तुलाशासनमानानां,	याज्ञ.,	५१५
तावत्कुल्याः सपिण्डाः स्युः,	देव.,	६६३	तुलाशिलाभ्यां तुल्यं च,	नार ,	२१८
तावत्सा बन्धने स्थाप्या,	कात्या.,	५९४	तुलास्त्रीवृद्धबालान्ध,	याज्ञ.,	२०४
तावदन्तरतो गच्छेत्,	कालिका.पु.,	२३१	तुलितो यदि वर्धेत,	पिता.,	२२२
तावन्यब्दानि सा स्वर्गे,	अङ्गिरा.,	६३२	तुल्यकालोपस्थितयोः,	बृह.,	३०१
तावन्न मुच्यते नारी,	,,	६३३	तुषाराङ्गारकपलास्थि,	नार.,	४४४
तावानेव स विज्ञेयो,	मनु.,	३४६	*तूर्यवादवीथी,	हारी.,	८३१

तूले द्विगुणं धान्यं,	हारी.,	२८४	तेभ्य एव क्षत्रिया,	गौत.,	८१५
तृणं वा यदि वा काष्ठं,	बृह.,	५३८	तेभ्य एव वैश्या,	”	”
तृणकाष्ठेष्टकासूत्रं,	”	२९०	ते वै सस्यस्य जातस्य,	मनु.,	७३८
तृणवन्मन्यते नारी,	दक्ष.,	६०६	तेषां च प्रसृतानां च,	कात्या.,	३७२
तृणशैवालरहिते,	पिता.,	२३६	तेषां च प्रेषितानां तु,	पिता.,	२३५
तृतीयं धनदण्डं तु,	मनु.,	७८१	*तेषां चौरसाः पुत्रः,	विष्णु.,	६६८
तृतीयं वायुदैवत्यं,	बृह-पिता.,	२२४	तेषां छित्वा नृपो हस्तौ,	मनु.,	५२७
तृतीयः पञ्चमश्चैव,	”	७०७	तेषां जिह्वां समुत्कृत्य,	नार.,	२६४
*तृतीयः पुत्रिका,	वसि.,	७२४	तेषां तु तत्परा वृत्तिः,	नार.,	३१७
तृतीयः शपथः प्रोक्तः,	नार.,	१९३	तेषां दोषमभिख्याप्य,	मनु.,	५१०
तृतीयतापतप्तं तं,	”	२२७	तेषां धनं हरेद्राजा,	बृह.,	७५२
तृतीयतस्तृतीयशं,	मनु-बृह.,	३६४	तेषां न दद्याद्यदि तु,	मनु.,	३४७
तृतीया वा भवेच्छूद्रा,	महाभा.,	६९८	तेषां नृपः प्रमाणं स्यात्,	कात्या.,	२५९
ते कूट साक्षिणां पापैः,	विष्णु.,	१४३	तेषां पतितवर्जैर्भ्यः,	देव.,	६६८
ते च चण्डालपर्यन्ताः,	व्यास.,	१५७	*तेषां पूर्वः पूर्वो,	आप.,	८११
ते चापि बाह्यान् सुबहून्,	मनु वि.,	८२१	तेषां वादः स्ववर्गेषु,	कात्या.,	१०७
ते तदष्टगुणं दाप्या,	बृह.,	४२६	*तेषां वृत्तीर्वैश्यामः,	हारि.,	८३१
ते द्वादश सुवर्णस्तु,	नार.,	८०९	तेषां वोढा पिता ज्ञेयः,	नार.,	७३०
तेन कार्याणि सिद्ध्यन्ति,	बृह.,	१८८	तेषां षड् बन्धुदायादाः,	देव.,	७१५
तेन चानृणतां याति,	श. लि. पैठी.,	७४२	”	नार.,	७१६
तेन चेदविवादस्ते,	मनु.,	१३२	”	मनु.,	७१५
तेन दत्तं तु भुञ्जीत,	नार.,	७९२	”	यम.,	७१४
तेन दुश्चरितेनासौ,	यम.,	७१८	तेषां स एव धर्मः स्यात्,	नार.,	६५५
”	हारी.,	”	तेषां सर्वस्वमादाय,	नार-कात्या.,	५२८
तेन नरा यमदण्डेन,	”	७७७	”	मनु.,	५६८
तेन लेख्येन तत्सिद्धिः,	कात्या.,	१७१	तेषां सवर्णा ये पुत्राः,	देव.,	७१६
तेन विटक्षत्रविप्राणां,	”	५५१	*तेषां सारानुसारतो,	श.लि.,	७१२
तेनार्धवृद्धिर्भोक्तव्या,	मनु.,	२९३	*तेषां हेतुरवस्थाने,	श.लि.,	७७६
तेन निन्दितैर्वर्तैर्युः,	”	८२९	तेषामपि न बालः स्यात्,	नार.,	११८
तेनेह कीर्तिमाप्नोति,	बृह.,	१२६	*तेषामप्राप्तव्यव,	बौधा.,	७५३
तेनैव तद्भवेद्देयं,	”	३६०	तेषामभावे गृहीयुः,	देव.,	७४९
तेनैव सा प्रदातव्या,	”	३७०	तेषामभावे राजाज्ञा,	व्यास.,	२५८
तेऽपि तद्भागिनस्तस्मात्,	कात्या.,	३५	तेषामभावे सामन्ता,	कात्या.,	४४३
तेऽपि स्युः सङ्गृहीतव्या,	नार.,	५४६	तेषामर्थं दश भागान्,	श.लि.,	७१२
ते पृष्टास्तु यथा ब्रूयुः,	मनु.,	४४२	तेषामाद्यमृणादानं,	मनु.,	४३
”	”	४४५	तेषामुपपन्नतन्तूनां,	”	६६७
*तेभ्यः पापांश,	श. लि.,	८००	तेषामुत्पादयितुः,	हारी.,	७२३

ते षोडश स्याद्धरणं,	मनु.,	८०८	त्रिभागं क्षेत्रजो भुङ्क्ते,	ब्रह्मपु.,	७११
तैः कृतं यत्स्वधर्मेण,	वृह.,	४२५	त्रिभागं पञ्चभागं वा,	वृह.,	४०१
*तैर्निवसद्भिः,	श.लि.,	८००	त्रिभागोने च सलिलं,	,,	१९९
तैलानामेव सर्वेषां,	कात्या.,	२९०	त्रिमिरेतैरविच्छिन्ना,	कात्या.,	१८०
तैस्तैरुपायैः संगृह्य,	मनु.,	३२४	त्रिमिरेव तु या भुक्ता;	विष्णु-कात्या.,	१७८
तोय त्वं प्राणिनां प्राणः,	पिता.,	२३७	त्रियोनिः कीर्त्यते तेन,	नार.,	४१
तोय प्रवर्तनात्स्वेयो	नार.,	४५८	त्रियोनिद्वयमियोगश्च,	,,	४७
तोयस्यातः प्रवक्ष्यामि,	पिता.,	२३४	त्रिरात्रं पञ्चरात्रं वा,	पिता.,	२४३
तोरणे तु तथा कार्ये,	पिता.,	२१५	*त्रिरात्रं पुरोहिताः,	वसि.,	७९६
तौल्यगणिममेयानां,	कात्या.,	१२४	त्रिरात्रात्सतरात्राद्वा,	पिता.,	२४७
तौ नृपेण ह्यधर्मज्ञौ,	मनु.,	२६४	त्रिरात्रोषितायैव,	,,	२१३
”	,,	३७१	त्रिविधः साहसैष्वेवं,	नार.,	८०७
तौ विना यस्य पित्रा च,	व्यास.,	१८०	त्रिविधस्यास्य दुष्टस्य,	,,	१८२
तौ हि च्युतौ स्वकर्मभ्यः,	मनु.,	७७६	त्रिविधास्ते समाख्याता,	वृह.,	३६६
त्यक्त्वा दुष्टांस्तु सामन्तान्,	कात्या.,	४४३	त्रिशत्कोट्योऽर्धकोटी च,	अङ्गिरा.,	६३२
त्यक्त्वा लोभादिकं राजा,	वृह.,	१०	त्रिशत्सर्वार्ण्यविच्छिन्ना,	वृह.,	१७८
त्यजन्ति पुरुषाः प्राज्ञाः,	बौधा.,	६१७	त्रिशद्विंशविनाशो वा,	कात्या.,	२०२
त्यजन्दाप्यस्तृतीयांशं,	याज्ञ.,	६१५	त्रिशद्वात्रात्त्रिपक्षाद्वा,	वृह.,	८३
त्यजन्न पतितनेतान्,	मनु.,	५६१	त्रिंशांशो रोमबद्धस्य,	नार.,	५२५
त्यजन् भार्यामवस्थाप्यो,	नार.,	६१५	त्रिंशते तण्डुला देयाः,	वृह.,	१९९
त्यजेत् पथिसहायं यः,	कात्या.,	४०८	त्रिषु कर्मस्वमिरतः,	गौत.,	७८३
त्रयः स्वतन्त्रा लोकेऽस्मिन्,	नार.,	२७४	*त्रिषु वर्णेषु,	श. लि.,	८२७
त्रयश्च पिण्डाः षण्णां स्युः,	बौधा.,	७२४	त्रिषु वर्णेषु यानि स्युः,	मनु.,	७८२
त्रयाणामपि चैतेषां,	वृह.,	५८१	त्रिषु वर्णेषु विज्ञेयं,	कात्या.,	३९६
त्रयाणामपि संदेहं,	,,	७७२	त्रिसन्ध्यं पूजयेन्नित्यं,	पिता.,	२१६
त्रयाणामुदकं कार्यं,	मनु.,	७४८	त्रीण्येतान्यविभाज्यानि,	नार.,	६७६
त्रयोदशं स्वभागं तु,	ब्रह्मपु.,	७११	त्रीण्येव साधनान्याहुः,	,,	४८५
*त्रयो वर्णाः,	वसि.,	७७७	त्रीण्येव हि प्रमाणानि,	वृह.,	७७२
त्रसरेणवोऽष्टौ विज्ञेया,	मनु.,	७७	*त्रीनंशान् क्षत्रियं,	विष्णु.,	७००
त्रायस्वास्मादभीशापात्,	याज्ञ.,	२४३	त्रीनेव च पितृन् हन्ति,	बौधा.,	१२९
त्रिचतुःपञ्चकृतवो वा,	नार.,	१९४	*त्रीन् क्षेत्रजपुत्रिका,	श. लि.,	७१२
”	,,	१९३	त्रीन् राजन्यः,	विष्णु.,	६९९
त्रिपक्षात्परतः सोऽर्थं,	वृह.,	३०७	त्रैविद्यनृपदेवानां,	याज्ञ.,	४८३
त्रिपक्षाद्ब्रुवन् साक्ष्यं,	मनु.,	१४३	त्रैविद्यप्रहितस्तत्र,	कात्या.,	१०१
त्रिपणो द्वादशपणो,	कात्या.,	५००	त्रैविद्यान् वृत्तिमद्ब्रूयात्,	याज्ञ.,	४१९
त्रिपलं तु सुसूक्ष्माणां,	नार.,	५२५	व्यव्दाद्ध्वं तु नागच्छेत्,	वृह.,	३६२
त्रिपौरुषी च त्रिगुणा,	व्यास.,	१८१	व्यवराः साक्षिणो ज्ञेयाः	याज्ञ.,	१०५

त्र्यवरैः साक्षिभिर्भाव्यो,  
त्र्यहाहोह्यं परीक्षित,  
त्र्यंशं दायोद्धरेद्विप्रो,  
त्र्यहाशौचे निवृत्ते तु,  
त्वं तुले सत्यधर्मासि,

”  
त्वं मुखं सर्वं देवानां,  
त्वं वेत्सि सर्वं भूतानां,  
त्वग्मेदकः शतं दण्ड्यो,  
त्वग्मेदे प्रथमो दण्डो,  
त्वमग्ने वेदाश्चत्वारः,  
त्वमग्ने सर्वभूतानां,  
त्वमग्ने सर्ववेदानां,  
त्वमग्नेः सर्वभूतानां,  
त्वमेव देव जानीषे,  
त्वमेव धृष्ट जानीषे,  
त्वमेव विष जानीषे,  
त्वमेव सर्वभूतानां,  
त्वमेवाग्ने विजानीषे,  
त्वमेवाम्भो विजानीषे,  
त्वरमाण इवाविद्धं  
त्वरमाणो न गच्छेत्तु,

द

दक्षा प्रियंवदा शुद्धा,  
दक्षिणासु च दत्तासु,  
दण्डं चैकादशगुणं,  
दण्डं तत्समं राज्ञे,  
दण्डं दद्यात्सवर्णासु,  
दण्डं प्रकल्पयेद्वाजा,  
दण्डं स दाय्यो द्विशतं,  
दण्डः क्षुद्रपशूनां च,  
दण्डः प्रणयितुं शक्यः,  
दण्डः शास्ति प्रजाः सर्वाः,  
दण्डः सुप्तेषु जागर्ति,  
दण्डनीयः स शैथिल्यात्,  
दण्डनीयायुभौ तौ

मनु., १०२  
नार., ४३६  
मनु., ६९७  
ब्रह्मपु., ६३४  
कालिका, पु., २२१  
याज्ञ., २१८  
पिता., २२८  
नार., २२१  
मनु., ४८८  
बृह., ४८८  
पिता., २२८  
विष्णु., २२९  
नार., २२८  
विष्णु., २३७  
नार., २२१  
विष्णु., २२०  
,, २४२  
नार., २२८  
विष्णु., २२९  
विष्णु., २३७  
नार., १४०  
पिता., २३१

कात्या., ६१२  
मनु., ३६४  
कात्या., ३७९  
याज्ञ., १९१  
,, ५९६  
विष्णु., ७७९  
याज्ञ., ५१२  
याज्ञ., ४९९  
मनु., ७९४  
,, ७९४  
,,  
कात्या., ७९८  
नार., ३८०

दण्डप्रणयनं कायै,  
दण्डयेज्जयिना साकं,  
दण्डशुल्कावशिष्टं च,  
दण्डस्तत्र तु नैव स्यात्,  
\*दण्डस्तु देशकाल,  
दण्डाजिनादिना युक्तं,  
दण्डेनैव समाप्नोषेत्,  
\*दण्डोत्सर्गं,  
\*दण्डोऽधोवर्णानां,  
\*दण्डो यथासारापकारं च,  
दण्डो वा दण्डशेषो वा,  
दण्डो हि सुमहातेजो,  
\*दण्ड्यः काणखञ्जादीनां,  
\*दण्ड्यः शोणितेन विना,  
दण्ड्यः स मूल्यं दशपणं,  
दण्ड्यः स राज्ञो भवति,  
\*दण्ड्यगुरुनक्षत्रायनं,  
दण्ड्यपशुयुधानोदक,  
दण्ड्यमुन्मोचयन् दण्ड्यात्,  
दण्ड्य व्यङ्गतायुक्ते,  
दण्ड्य हस्तेनोद्गूरयिता,  
दत्तं मयाऽमुकीयाय,  
दत्तं सप्तविधं विद्यात्,  
\*दत्तः क्रीतोऽपविद्धः,  
दत्तकश्च स्वयं दत्तः,  
दत्तमूल्यस्य परयस्य,  
दत्तस्य पुनरादानं,  
दत्तस्यापहवो यत्र,  
दत्तान्यापि यथोक्तानि,  
दत्ताप्रदानिके नाम,  
दत्तोऽपविद्धः क्रीतश्च,  
दत्त्वा कन्यां हरन्दण्ड्यो,  
दत्त्वा तु ब्राह्मणायैव,  
दत्त्वादत्ते तथादत्ते,  
\*दत्त्वा द्वितीयमर्धं,  
दत्त्वा द्रव्यमसम्प्रभ्यः,  
दत्त्वा धनं तद्विप्रेभ्यः,

याज्ञ., ४७४  
बृह., २६८  
मनु., ३१५  
कात्या., ७९७  
वसि., ७७८  
बृह., ५२२  
मनु., ७७६  
वसि., ७९६  
हारी., ५२२  
श.लि., ७७८  
व्यास., ३१६  
मनु., ७९५  
विष्णु., ४७५  
,, ४८८  
मत्स्यपु., ४०६  
नार., ३४४  
विष्णु., ४७८  
विष्णु., ४५५  
,, ५६९  
,, ४७७  
,, ४८७  
व्यास., १५७  
नार., ३७३  
हारी., ७१३  
ब्रह्मपु., ७३६  
नार., ४३४  
,, ४२  
कात्या., १९९  
,, २१३  
नार., ३७३  
बृह., ७१७  
याज्ञ., ६९२  
,, ३३७  
कात्या., ९३  
विष्णु., ७९२  
नार., ३७३  
कात्या., ७६

दत्त्वा भूमिं निबन्धं वा,  
 दत्त्वाणं पाटयेल्लेख्यं,  
 ददतो यद्भवेत्पुण्यं,  
 ददौ स दश धर्माय,  
 दद्याच्चापहरेचांशं,  
 दद्यात्तमथवा चौरं,  
 दद्यात्पक्षान्तसंबन्धं,  
 दद्यादपुत्रा विधवा,  
 दद्याद्वैते कुटुम्बार्थीनं,  
 दद्याद्विषं सोपवासः,  
 दद्यास्त्वमिति यो दत्तः,  
 दद्युर्नैवोपशाम्येयुः  
 दद्युर्वा स्वकृतां वृद्धिं,  
 दद्युस्तद्विक्थिनः प्रेते,  
 दद्युस्ते बीजिनो पिण्डं,  
 दध्नः क्षीरस्य तक्रस्य,  
 दध्यक्षतहविर्गन्धैः,  
 दमदानरता नित्यं,  
 दमोऽन्तिमः समायां तु,  
 दम्पती विवदेयातां,  
 दयितं याऽन्यदेशस्थं,  
 दर्पणस्थं यथा बिम्बं,  
 दर्पाद्वा यदि वा मोहात्,  
 दर्शनप्रतिभूर्यत्र,  
 "

दर्शनप्रातिभाव्येतु,  
 दर्शनाद्वृत्तनष्टस्य,  
 दर्शने प्रत्यये दाने,  
 दर्शयेयुर्निधिनामानि,  
 दर्शितं प्रतिकालं यत्,  
 दशकं तु शतं वृद्धिः,  
 दशकं पारदेश्ये तु,  
 दशग्राम शतग्राम,  
 \*दशपुरुषवती,  
 दशमं द्वादशं वापि,  
 दशस्थानानि दण्डस्य,  
 दशातिवर्तनान्याहुः,

याज्ञ., १५८  
 ,, ३३७  
 बृह., ३४०  
 मनु., ७२६  
 याज्ञ., ७५६  
 कात्या., ५५३  
 कात्या बृह., ६१  
 नार., ३१८  
 याज्ञ., ३१६  
 शङ्खः, नार., २४२  
 कात्या., ३३९  
 ,, ७९८  
 याज्ञ., २८३  
 ,, ३१२  
 नार., ७४४  
 मनु., ५३५  
 नार., २१६  
 बृह., ६३६  
 ,, ५८५  
 नार., ५१  
 व्यास., ६३४  
 कात्या., १६६  
 नार., ५७९  
 कात्या., ३०४  
 याज्ञ., ११  
 मनु., ३१५  
 कात्या., ३८१  
 बृह., ३०४  
 ,, ४०५  
 नार., १७०  
 ,, ७६४  
 याज्ञ., ५१७  
 कात्या., ४५२  
 वसि., ७८८  
 मनु., ५५५  
 ,, ७८२  
 ,, ५०१

\*दशानां चैकमुद्वरेज्ज्येष्ठः

दशानामपि चैतेषां,  
 दशापरे तु क्रमशो,  
 दशाहः सर्वबीजानां,  
 दस्यवः संप्रवर्तन्ते,  
 \*दस्युस्तेच्छगणानां,  
 दस्युवृत्ते यदि नरे,  
 दहेत्पापकृतं तन्न,  
 दातव्यं बान्धवैस्तत्स्यात्,  
 दातव्यस्तत्र कालः स्यात्,  
 दाता न लभते तत्तु,  
 दाताऽहमेतद्ददविणं,  
 दातुः पालयितुः स्वर्गं,  
 दानं प्रज्ञापनाभेदः,  
 दानकालेऽथवा तूष्णीं  
 दानग्रहणधर्माश्च,  
 दानग्रहणपञ्चज्ञं,  
 दानप्रतिभुवि प्रेते,  
 "

दानप्रभृति या तु स्यात्,

दानार्थे वा धनार्थे वा,  
 दानोन्मुखो नाभिषेज्यो,  
 दानोपस्थानं विश्वासं,  
 दान्तं कुलीनं मध्यस्थं,  
 दापयित्वा हृतं चौर्यं,  
 दापयेच्छिल्पिदोषातु,  
 दापयेत्पणपादं गां,  
 दापयेद्वनिकस्यार्थं,  
 "

दाप्यः परणमेकोऽपि,

दाप्यस्तु अष्टगुणं यश्च,  
 दाप्यस्तु दशमं भागं,  
 दाप्यो दण्डं च यो यस्मिन्,  
 दाप्यो भृतिचतुर्भागं,  
 दाप्यो यत्तत्र नष्टं स्यात्,  
 दायभाग इति प्रोक्तं,  
 दायादानां विभागे तु,

बौधा., ६५४  
 बृह., २६  
 मनु., ७१०  
 नार., ४३७  
 ,, ५४५  
 श. लि., ८३३  
 नार., ५४७  
 यम., ५९०  
 मनु., ३१३  
 कात्या., ६२  
 ,, २७८  
 बृह., २०४  
 व्यास., १५८  
 कात्या., १९४  
 ,, १९४  
 नार., २७७  
 ,, ७५८  
 मनु., ३०५  
 ,, ३१५  
 ,, ६२९  
 हारि., २७५  
 व्यास., ५५  
 कात्या., ३०४  
 ,, २४  
 याज्ञ., ५४७  
 कात्या., ३४९  
 ,, ४६४  
 मनु., २६४  
 ,, ३३१  
 नार., ३१२  
 याज्ञ., ५१४  
 ,, ४०१  
 ,, ४९३  
 नार., ४०७  
 ,, ४०५  
 नार., ६४८  
 कात्या., ६७२



दायादेभ्यो न तद्द्यात् ,

„

दायादेऽसति बन्धुभ्यो,

\*दायेनाव्यतिक्रम,

दारपुत्रपशून् रुद्ध्वा,

दाराः पुत्राश्च सर्वस्वं,

दाराधीनस्तथा स्वर्गः,

दाशापराधतस्तोये,

दासचारणमल्लानां,

दासत्वात्स विमुच्येत,

दासनैकृतिकाश्राद्ध,

दासस्त्रीभूगृहाराम

दासस्त्रीमातृशिष्यैर्वा,

दासस्य तु धनं यत्स्यात् ,

दासाः कर्मकराः शिष्याः,

दासाश्चरथहर्ता च,

दासी तु हरतो मध्यः,

दासी च हरतो मध्यः,

दासेनोढा च दासी या,

दासोऽन्धो बधिरः कुष्ठी,

दास्यं तु कारयेन्मोहात् ,

दास्यं विप्रस्य न क्वचित् ,

दास्यां वा दासदास्यां वा,

दास्यायैव हि सृष्टोऽसौ,

दिगन्तरप्रपन्ने वा,

दिगन्तरान्गच्छति चेत्

दिनं मासार्धमासं वा,

दिनं क्रमेण वा कर्म,

दिनमासार्धषण्मास,

दिवं गतानि विप्राणि,

„

दिवःपुनरिहायाता,

दिवसस्याष्टमं भागं,

दिवा कृते कार्यविधौ,

दिवागृहीतं यत्केता,

दिवा चरयेः कार्यार्थः

\*दिवा पशूनां वृकाद्युपघाते,

याज्ञ., ६७४

व्यास., ६७६

नार., ३६२

आप., ७१९

बृह., ३२५

कात्या., ३७४

मनु., ६०९

„ ७९०

कात्या., १०७

नार., ३९१

„ १०९

कात्या., २६६

„ ३१५

कात्या., ३९४

कात्या., ७६

मनु., ५२९

नार., ५३०

„ „

कात्या., ३९५

उशना., ११८

मनु., ३९८

कात्या., ३९६

मनु., ७०४

„ ३९८

कात्या., ६६

„ „

„ ६५

„ ६१२

बृह., ३८५

मनु., ६३७

यम., ६३८

कात्या., ६२९

कात्या., ४४

नार-बृह., ९२

मरीचि., ३५७

मनु., ८३२

विष्णु., ४१६

दिवा वक्तव्यता पाले,

दिव्यं चेद्देशयेद्वादी,

दिव्यं तु वर्जयेन्नित्यं,

दिव्यं प्रकल्पयेन्नैव,

दिव्यमालम्बते वादी,

दिव्यान्येतानि धर्म्याणि,

दिव्येन शुद्ध पुरुषं,

दिव्येन शोथयेत्तत्र,

दिव्येषु सर्वकार्याणि,

दिव्यैः कार्यं परीक्षेत,

दिव्यैर्विशुद्धो मोक्ष्यः स्यात् ,

दिव्यैर्विशोधितः सम्यक् ,

दीनानाथविशिष्टेभ्यो,

दीयमानं करे कृत्वा,

दीयमानं न गृह्णाति,

„

दीयमानमथात्मानं,

दीर्घप्रवासिनिर्बन्धु,

दीर्घाध्वनि यथादेशं

दुःखासिका कलिर्भेदे,

दुःखिता यत्र दृश्येरन् ,

दुःखिते शोणितोत्पादे,

दुःखेन हि निवार्यन्ते,

दुःखोत्पादि गृहे द्रव्यं,

दुर्गमध्ये गृहं कुर्यात् ,

दुर्गायाः पाययेच्चोरान् ,

दुर्गायाः स्नापयेच्छूलं,

दुर्दृष्टास्तु पुनर्दृष्ट्वा,

दुर्दृष्टे व्यवहारे तु,

दुर्भिक्षे धर्मकार्थे,

दुष्टस्यैव हि यान् दोषान् ,

दुष्टाः साहसिकाश्चण्डाः,

दुष्टैर्दुष्टं भवेल्लेख्यं,

दुहिताचार्यभार्या च,

दुहितृणामभावे तु,

दूतकः खटिकाग्राही,

दूताय साधिते कार्ये,

मनु., ४१५

कात्या., ९५

„ २०६

„ २०८

„ ९६

बृह., १९८

विष्णु., २४९

कात्या., ९७

पिता., २१३

बृह., ९६

„ ५७६

बृह., २५८

दक्ष., ३७८

पिता., २४२

नार., ४३३

याज्ञ., २९१

कात्या., ६४७

„ ३२३

मनु., ७८९

व्यास., ६१४

मनु., ७८२

याज्ञ., ४९९

कात्या., ४६४

याज्ञ., ५५९

बृह., ४४

पिता., २४५

„ २४६

याज्ञ., २६८

नार., २६९

याज्ञ., ६८७

कात्या., ४७३

यम., ६००

कात्या., १६३

नार., ५८७

कात्या., ६९०

बृह., १०२

कात्या., ५७

दूतीप्रस्थापनैर्वापि,	नार.,	५७८	देवासुरमनुष्याणां,	नार.,	२२२
दूतीसंप्रेषणैर्वापि,	,,	५७८	देशं कालं च भोगं च,	याज्ञ.,	५२६
दूतोपचारयुक्तश्चेत्,	कात्या.,	५८०	देशं कालं च योऽतीयात्,	,,	४०१
दूषणे च करच्छेदः,	याज्ञ.,	५९७	देशं कालं च रूपं च,	मनु.,	१५
दूषयेत् सिद्धतीर्थानि,	कात्या.,	४५६	देशं ग्रामं दिशं नाम,	नार.,	५४३
दूषितो गर्हितः साक्षी,	बृह.,	१६४	देशः कालस्तथा स्थानं,	कात्या.,	६०
दृश्यते च जयस्तस्य,	कात्या.,	७६४	देशकालवपुः शक्ति,	याज्ञ.,	५३७
दृश्यन्ते विविधाकारा,	नार.,	१६	देशकालवयः शक्ति,	कात्या.,	५७
दृश्यमानं विभज्येत,	कात्या.,	६७३	देशकालवयोद्वय,	नार.,	१५१
दृश्यमाना विभज्यन्ते,	,,	६७३	देशकालविहीनश्च,	कात्या.,	६१
दृश्याद्वा तद्विभागः स्यात्,	याज्ञ.,	७०६	देशकालातिपत्तौ वा,	याज्ञ.,	३५०
दृष्टं संप्रहणं तज्ज्ञैः,	नार.,	५८२	देशकालार्थसम्बन्ध,	नार.,	१९४
दृष्टप्रयोगश्चैवानौ,	नार.,	२२७	देशकालौ क्रियाकारे,	कात्या.,	३०५
दृष्टमेव फलं तत्र,	दक्ष.,	६१३	देशग्रामकुलादीनां,	बृह.,	४७२
दृष्टश्रुतान भूतत्वात्,	नार.,	९८	*देशजातिकुधर्माश्च	गौत.,	१९
दृष्टान्तत्वेन शास्त्रान्ते,	कात्या.,	७७४	देशजातिकुलादीनां,	नार.,	४७१
दृष्टिपातं प्रणालीं च,	,,	४५३	देशजातिकुलानां च,	बृह.,	२०
दृष्टे पत्रे स्फुटं दोषं,	,,	१७०	देशधर्मानवेक्ष्य स्त्री;	नार.,	३१९
देयं पैतामहं पौत्रैः	नार.,	३१०	,,	,,	६४७
देयं प्रतिश्रुतं चैव,	याज्ञ.,	३७६	*देशविशेषे सुवर्णं,	आप्र.,	६५७
देयं भार्याकृतमृणं,	कात्या.,	३१७	देशस्थितिः पूर्वकृता,	व्यास.,	२५८
देयं यत्प्रतिश्रुतं स्यात्,	,,	३१५	देशस्थित्या द्वितीयस्तु,	बृह.,	२५९
देयं वा निःस्ववृद्धान्,	बृह.,	४२७	देशस्थित्यानुमानेन,	,,	२६१
देयं स्वामिनि चायातं,	कात्या.,	४५८	देशस्थित्या प्रदातव्यं,	बृह.,	३६९
देयानादेययोर्वापि,	बृह.,	३३१	देशस्य जातेः सङ्गस्य,	कात्या.,	६८०
देवखातेषु यत्तोयं,	पिता.,	२३६	देशस्याचरणान्नित्यं,	,,	२५९
देवतापितृपादांश्च,	नार.,	३५६	देशस्यानुमतेनैव,	,,	२२
देवताराधनं कुर्यात्,	ऋग्यशृङ्ग.,	६२२	देशकालार्थसंख्याभिः,	बृह.,	१९८
देवतास्नानपानीय,	कात्या.,	२५१	देशाचारयुतं वर्षं,	,,	१५५
देवदत्तां पतिर्भार्या,	मनु.,	६११	देशाचारविरुद्धं यत्,	कात्या.,	१६४
देवब्राह्मणपादांस्तु,	बृह.,	२५६	देशाचाराविरुद्धं यत्,	नार.,	१६१
देवब्राह्मणराज्ञां च,	नार.,	५०६	देशाचारस्थितियुतं,	कात्या.,	१६१
देवब्राह्मणसान्निध्ये,	मनु.,	१२४	देशाचारस्थितिस्त्वन्या,	नार.,	२८६
*देवरवत्यामन्य,	गौत.,	७८४	देशाचारानमिज्ञा ये,	बृह.,	२९
देवराजकृतो दोषः	बृह.,	८४	देशाचारेण दाप्याः स्युः,	कात्या.,	३२५
*देवराजोपघातादृते,	विष्णु.,	२९४	देशादिकं क्षिपन् दाप्यः,	बृह.,	४८३
देवराद्वा सपिण्डाद्वा,	मनु.,	६३९	देशाद्देशान्तरं याति,	याज्ञ.,	७८

देशाध्यक्षादिना लेख्यं,	व्यास.,	१७२	द्रव्यं तदौपनिधिकं,	याज्ञ.,	३३८
देशानलब्धान् लिप्सेत,	मनु.,	७७०	द्रव्यं विना तु प्रथमं,	बृह.,	४७२
देशानुरूपतः पक्षं,	बृह.,	३०७	द्रव्यसंख्यान्विता देया,	,,	१९९
देशान्तरस्थे दुर्लेख्ये,	याज्ञ.,	१६२	द्रव्यस्वामिविक्रीतं,	नार.,	३५३
देशान्तरे मृते तस्मिन्,	ब्रह्मपु.,	६३४	द्रव्यहृद्दाप्यते तत्र,	कात्या.,	३२९
देशापहृतविक्रीता,	नार.,	६४५	द्रव्याणां कुशला ब्रूयुः,	याज्ञ.,	५२६
देहेन्द्रियविनाशे तु,	कात्या.,	४९३	द्रव्याणि हिंस्याद्यो यस्य,	मनु.,	५५८
दैवतस्करराजाग्निं,	नार.,	३६१	द्रव्यापेक्षो दमस्तत्र,	बृह.,	५५७
दैवपित्र्यातिथेयानि,	मनु-विष्णु.,	६१३	द्रव्ये पितामहोपात्ते,	,,	६५२
दैवराजकृते तद्वत्,	नार.,	३४२	द्रष्टव्यो व्यवहारस्तु,	याज्ञ.,	४९६
दैवराजोपघातेन,	बृह.,	२९५	द्रोहभावं कुचर्यां च,	मनु.,	६०४
दैवसाध्ये पौरुषेयीं,	कात्या.,	९५	द्वन्द्वगुद्धे तु यः कश्चित्,	बृह.,	७६६
दैविकी वा क्रिया प्रोक्ता,	,,	९२	द्वयं निगृह्य दाप्यः स्यात्,	मनु.,	३४७
दैवीं वाचं स वदति,	नार.,	३३	द्वयोः सन्तप्तयोः सन्धिः,	बृह.,	८५
दैवोत्पादविदो भद्राः,	बृह.,	७०७	द्वयोः समानो धर्मज्ञो,	,,	१००
दोलायमानौ यौ संधिं,	,,	८५	द्वयोरापन्नयोस्तुल्यं,	नार.,	४९७
दोषवत्करणं यत्स्यात्,	नार.,	४२६	*द्वयोर्वा,	गौत.,	७३९
दोषे सति न दोषः स्यात्,	दक्ष.,	६१६	द्वयोर्विरोधे कर्तव्यं,	बृह.,	१४
दोषो भवेत्तथा न्यासे,	बृह.,	३४०	द्वयोर्विवदतोरर्थं,	नार.,	८८
दोहदस्याप्रदानेन,	याज्ञ.,	६१०	द्वयोर्विवादे सामन्तैः	कात्या.,	४४३
दोह्यवाद्यकर्मयुता,	व्यास.,	२८२	द्वयोर्हि कुलयोः शोकं,	मनु.,	६०३
दौहित्र एव तु हरेत्,	मनु.,	७२५	द्वात्रिंशदङ्गुलान्याहुः,	नार.,	२२५
दौहित्रो ह्यखिलं रिक्थम्,	,,	७२५	,,	बृह.पिता.,	२२४
द्यूतं निषिद्धं मनुना,	बृह.,	७६२	*द्वादश इत्येव,	वसि.,	७१८
द्यूतं नैव तु सेवेत,	कात्या.,	७६२	द्वापरे च कलौ नृणां,	बृह.,	६४३
द्यूतं प्रकीर्णं चैव,	नार.,	४२	द्वारमार्गं क्रियाभोगं,	कात्या.,	९४
द्यूतं समाह्वयं चैव,	मनु.,	७६२	द्वाराणां चैव भेत्तारं,	मनु.,	५६७
द्यूतमेकमुखं कार्यं,	याज्ञ.,	७६६	द्वारोपसेवनं नित्यं,	व्यास.,	६२२
द्यूतमेतत्पुराकल्पे,	मनु.,	७६२	द्वावंशौ प्रतिपद्येत,	नार.,	६५४
द्यूतस्त्रीपानसक्ता च,	याज्ञ.,	५४४	*द्वावंशौ राजन्यायाः,	वसि.,	७००
द्यूते कूटाक्षदेविनां,	विष्णु.,	७६८	*द्वावंशौ वैश्यः,	विष्णु.,	,,
द्यूते च कूटाक्षदेविनां,	,,	५२१	*द्वावंशौ वैश्यः,	,,	,,
द्यूते समाह्वये चैव,	कात्या.,	९३	*द्वावंशौ वैश्यः,	,,	६९९
द्यूतैर्भूमिरापो हृदयं,	मनु.,	१२५	*द्वावंशौ वैश्यासुतः,	,,	६९९
द्रविणार्हश्च धुर्यश्च,	कात्या.,	३२१	द्रावेकयोनिजावेव,	यम.,	८१७
द्रव्यं तदीयं संगृह्य,	बृह.,	३२९	द्रावेतौ ब्रह्मचण्डालौ,	,,	८२७
द्रव्यं तदौपनिधिकं,	याज्ञ.,	१८७	द्विः पादस्त्रिंशद्भागस्तु,	नार.,	५२६

द्विकं त्रिकं चतुष्कं च,  
द्विकं शतं वा गृहीयात्,  
द्विकं शतं हि गृह्णानो,  
द्विकेनार्थं समादाय,  
द्विगुणं तु तृतीयेऽङ्गि,  
द्विगुणं त्रिगुणं चैव,  
द्विगुणं दण्डमास्थाय,  
द्विगुणं प्रतिदातव्यं,  
द्विगुणः शोणितोद्भेदे,  
द्विगुण त्रिगुणो ज्ञेयः,  
द्विगुणस्योपरि यदा,  
द्विगुणा वान्यथा ब्रूयुः,  
द्विगुणास्तूतरा ज्ञेयाः,  
द्विगुणो वा कल्पनीयः,  
द्विजं प्रद्व्याभक्ष्येण,  
द्विजत्वममिकांक्षन्ति,  
द्विजस्य स्त्रीषु धर्मोऽयं,  
द्विजातयः सवर्णासु,  
\*द्विजातीनां शूद्रस्त्वेकः,  
द्विजानां सन्निधावेव,  
द्विजान् विहाय यः पश्येत्,  
द्वितीयं तु पितुस्तस्याः,  
द्वितीया वा भवेच्छुद्रा,  
द्वितीये चैव तज्ज्ञेयं,  
\*द्वितीये पुत्रं तृतीये,  
द्वितीये हस्तचरणौ,  
द्वितीयेऽङ्गि ददत्केता,  
\*द्वितीयेऽपराधे न स,  
द्वित्रिलिपिज्ञः स्वकृतं,  
दिनेत्रमेदिनो राजद्विष्टा,  
द्विपणे द्विशते दण्डो,  
द्विपादमर्धमासं तु,  
\*द्विपितुः पिण्डदानं स्यात्,  
द्विप्रकारा क्रिया प्रोक्ता,  
द्विप्रकारो भागभृतः,  
द्विरभ्यस्ताः पतन्त्यक्षा,  
द्विविधान् तस्करान् विद्यात्,

मनु., २८०  
,,  
,,  
बृह., ७७१  
नार., ४३५  
,, २८४  
,, २६७  
याज्ञ., ३०८  
बृह., ४८८  
,, ४८६  
,, ३२८  
याज्ञ., १४९  
कात्या., ४४३  
बृह., ५५७  
याज्ञ., ५६४  
मनु., १३५  
कात्या., ६४३  
मनु., ८२६  
विष्णु., ७०३  
शङ्ख-नार., २४२  
व्यास., २९  
मनु., ७२८  
महाभा., ६९८  
नार., ५३२  
हारी., ७२३  
मनु., ५३२  
नार., ४३५  
विष्णु., ७७९  
व्यास., १७२  
याज्ञ., ४८९  
,, ५२३  
नार., ४३७  
बौधा., ७२४  
बृह., ९१  
,, ३८६  
नार., ७६५  
मनु., ५०७

द्विशतं तु दमं दाप्यः,  
द्विसहस्रपणो दायः,  
द्वे कृष्णले समधृते,  
द्वेशते खर्वटस्य स्यात्.,  
द्वैधे बहूनां वचनं,  
द्वौतुयौ विवदेयातां,  
\*द्वौ भागौ पितुर्द्वौ,  
\*द्वौ लोके धृतव्रतौ,  
\*द्वौ वैश्यः,  
द्वौ सपिण्डः सकुल्यो वा,  
द्वयंशं वा पूर्वजस्य स्यात्.,  
द्वयंश हरेज्ज्येष्ठः,  
द्वयन्तरः प्रातिलोम्येन,  
द्वयन्तरश्चानुलोम्येन,  
द्वयभियोगश्च दिज्ञेयः,  
द्वयवरोऽष्टपणास्त्वन्यः,  
द्वयामुच्यायणका द्युः,  
द्वयेकान्तरासु जातानां,

ध

धकाराद्धर्ममूर्तिस्त्वं,  
\*धटं च समयेन गृहीयात्  
धटं तु कारयेन्नित्यं,  
धटः सर्वर्तुकः प्रोक्तो,  
धट त्वं ब्रह्मणा सृष्टः,  
धटादीनि विषान्तानि,  
धटादुच्चतरे स्यातां,  
धटाया धर्मजान्ता च,  
धटेऽभियुक्तस्तुलितो,  
धटोऽग्निरुदकं चैव,  
धनं तत्पुत्रिकाभर्ता,  
धनं पत्रनिविष्टं तु,  
धनं भवेत्समृद्धानां,  
धनं मूलीकृतं दत्त्वा,  
धनं यो विभृयाद्भातुः,  
धनं वृद्ध्या गृहीत्वा तु,  
\*धनग्राहिणि प्रेते,

मनु., ५९७  
व्यास., ६८४  
मनु., ८०८  
याज्ञ., ४६१  
,, १४९  
मनु., ७४५  
श. लि. ७१२  
गौत. ७७७  
विष्णु., ६९९  
देव., ७०२  
गौत., ६६१  
वसि., ६६१  
नार., ८१६  
,, ८१५  
,, ४१  
,, ७९९  
,, ७२३  
मनु., ८१२  
पिता., २२०  
विष्णु.,  
पिता., २१६  
,, २०३  
,, २२०  
,, २१०  
,, २१५  
बृह., ९१  
,, २२३  
नार., १९७  
मनु., ६९१  
कात्या., ६८०  
बृह.,  
बृह., २९५  
मनु., ७०९  
बृह., १५४  
विष्णु., ३११

धनमेवंविधं सर्वं,	कात्या.,	६७८	धर्मादिनोद्वाह्य ऋणं,	बृह.,	३३६
धनस्त्रीहासिपुत्राणां,	नार.,	३२०	धर्माद्विचलितं हन्ति,	मनु.,	७९५
धनिकर्णिकथोरेवं,	नार.,	३३७	धर्माद्विचलिता दण्ड्या,	याज्ञ.,	७८०
धनिकस्योपधादोषात्,	कात्या.,	१६३	धर्मार्थं प्रीतिदत्तं च,	कात्या.,	६७३
धनिकेन स्वहस्तेन,	,,	१६४	धर्मार्थे येन दत्तं स्यात्,	मनु.,	३८०
धनी चोपगतं दद्यात्,	याज्ञ.,	३३६	धर्मार्थोपग्रहः कीर्तिः,	बृह.,	८५
धनी तावत् समादधात्,	बृह.,	१७५	धर्मासनमधिष्ठाय,	मनु.,	७
धनुःशतं परीणाहो,	याज्ञ.,	४६१	धर्मे गृहीते शुद्धः स्यात्,	बृह.,	२५४
धनुःशतं परीहारो,	मनु.,	४६२	धर्मेण व्यवहारेण,	बृह.,	२५८
धनोष्मणा पच्यमाना,	मनु.,	५६८	,,	मनु.,	३२४
धरणानि दश ज्ञेयः,	,,	८०८	धर्मोपदेशं दर्पेण,	मनु.-नार.,	४८६
धर्मं च व्यवहारं च,	कात्या.,	२६०	धर्मोपदेशकर्ता च,	बृह.,	४७९
धर्मः स नो यत्र न सत्यं,	नार.,	३८	धर्मोपधिवलात्कारैः,	,,	३२४
धर्म एव हतो हन्ति,	मनु.,	३७	धर्मो विद्धस्त्वधर्मेण,	मनु.-नार.,	३६
धर्मगौरवमाहात्म्यात्,	पिता.,	२२२	धर्म्यं विभागं कुर्वीत,	मनु.,	६९७
*धर्मचर्यया जघन्यो,	आप.,	८२६	धर्म्यं सर्वर्तुकं प्रोक्तं,	नार.,	२०३
धर्मपत्नी समाख्याता,	दक्ष.,	६१३	धात्राऽक्षराणि सृष्टानि,	बृह.,	१५२
धर्मपर्यायवचनैः,	नार.,	२२१	धान्यं दशभ्यः कुम्भेभ्यो,	मनु.,	५३२
,,	विष्णु.,	२२०	*धान्यस्य द्विगुणा,	विष्णु.,	२८९
धर्मप्रधाना ऋजवः,	याज्ञ.,	१०५	धान्यहारी दशगुणं,	बृह.,	५३२
धर्मप्रवक्ता नृपतेः,	मनु.,	२९	*धान्यापहार्येकादशगुणं,	विष्णु.,	५३३
धर्मरक्षार्थमाहूतैः,	नार.,	२१६	धान्ये चतुर्गुणा प्रोक्ता,	बृह.,	२८९
धर्मवंशपरित्यक्तः,	देव.,	६१६	धान्ये सदे लवे वाहये,	मनु.,	२८८
*धर्मव्यपेक्षासु,	विष्णु.,	६२१	धारणं परवस्त्राणां,	कात्या.,	५८०
धर्मशास्त्रं पुरस्कृत्य,	नार.,	९	धारयेदुत्तरे पार्श्वे,	नार.,	२१७
धर्मशास्त्रं समाश्रित्य,	मनु.,	४३	धार्यं मन्वादिकं शास्त्रं,	बृह.,	१४
धर्मशास्त्रविरोधे तु,	नार.,	१४	धार्योऽवरुद्धस्त्वृणिकः,	कात्या.,	३२५
धर्मशास्त्रानुसारेण,	याज्ञ.,	८	धिग्वणानां चर्मकार्यं,	मनु.,	८२९
धर्मशास्त्रार्थकुशलाः,	नार.,	२८	धूपोपहारयन्त्रैश्च.,	शङ्ख-नार.,	२४२
धर्मशास्त्रार्थकुशलैः,	कात्या.,	९	धृतं वस्त्रमलङ्कारो,	कात्या.,	६८०
धर्मशास्त्रार्थशास्त्राभ्यां,	नार.,	१२	धेनावनुद्धि च्चेत्रं,	कात्या.,	६७
धर्मश्च व्यवहारश्च,	,,	४१	धेनूष्ठी वहन्नश्चो,	मनु.,	१९१
,,	,,	२६१	ध्यायस्यनिष्ठं यत्किञ्चित्,	,,	६०५
धर्मस्तु व्यवहारेण,	बृह.,	२६१	ध्रुवं द्यूतात्कलिर्यस्मात्,	कात्या.,	७६३
धर्मस्थः कारणैरेतैः,	मनु.,	८०	ध्वजाहृतं भवेत्तु,	,,	६७८
धर्मस्यार्थस्य यशसो,	नार.,	४१	ध्वजिनी सन्धिनी चैव,	नार.,	४४८
धर्मस्याव्यभिचारार्थं,	मनु.,	१४१			

## न

न कथंचन दुर्योनिः,	मनु.,	८२८	न चेत्प्रत्यभिजानीयात्,	कात्या.,	१०४
न कश्चिदोषितः शक्तः,	,,	६०८	न चेद्वनिकदोषेण,	,,	२९५
न कालहरणं कार्यं,	,,	१२३	*न चैकं पुत्रं दद्यात्,	वसि.,	३७५
न किंविषेणापवदेत्,	नार.,	४८१	न चैकस्मिन् विवादे तु,	कात्या.,	७२
न कुर्युस्तत्तदेवैषाम्,	कात्या.,	७९८	न चैवस्त्रीवधं कुर्यात्,	यम.,	६१८
*न कृष्टिपैतिब्राह्मणानां च,	विष्णु.,	२०६	न चैवोपगतं दद्यात्,	बृह.,	३३६
न कुष्ठयसमर्थलोहकाराणां,	,,	२०६	न चोत्तमां न चाक्रामां,	कात्या.,	६४७
न केनचित्कृतो यस्तु,	बृह.,	४९	न जघन्यतमस्तेषां,	नार.,	३८८
न कुद्वैर्नापि संयुष्टैः,	कात्या.,	११३	न जातु ब्राह्मणं हन्यात्,	मनु.,	७८३
न क्लिश्यन्ते साक्षिसभ्या,	बृह.,	८५	*न जीवति पितरि रिक्थं	श.-लि.,	६४९
न क्षयो न च वृद्धिः स्यात्,	याज्ञ.,	५२५	न जैहमेन प्रवर्तते,	नार.,	४३४
न क्षेत्रगृहदासानां,	कात्या.,	२७२	*नऽयितर्यनुवादित्वं,	हारी.,	८३१
*न गणिकाधूर्तचारिणी,	श.लि.,	६२३	नऽश्व करणश्चैव,	मनु.,	८२६
नगरग्रामगणिनो,	नार.,	४४४	न च तं नयेत् साक्ष्यं तु,	,,	३५१
नगरग्रामदेशेषु नियुक्ता,	कात्या.,	११३	न तं भजेरन् दायदाः,	मनु-विष्णु.,	६८३
नगरप्रतिरुद्धः सन्,	नार.,	१२७	न तच्छक्यमपाहर्तुं,	नार.,	१७९
न गूहेतागमं क्रेता,	नार.,	३५६	,,	यम.,	१३
नग्नो मुण्डः कपाली च,	मनु.-ना.,	१३२	न तत्पुत्रा ऋणं दद्युः,	याज्ञ.,	३०४
न ग्राह्यो ह्यन्यथाकारी,	कात्या.,	५८०	न तत्पुत्रैर्भजेत्सार्धं,	मनु-विष्णु.,	६५२
न च तत्कारणं ब्रूयात्,	,,	१२२	न तत्प्रवर्तयेद्राजा,	यम.,	११
न च तद्दण्डपारुष्ये,	नार.,	४९८	न तत्र कारणं भुक्तिः.	याज्ञ.,	१८४
न च द्विषन्त्यास्त्यागोऽस्ति,	मनु.,	६१५	न तत्र दोषः पालस्य,	नार.,	४६८
न च पूर्वापरं विद्यात्,	,,	८०	न तत्र प्रणयेद्दण्डं,	मनु.,	४६२
न च प्रापितमन्येन,	,,	४६	*न तत्र बीजी,	श.-लि.,	७३९
न च भार्याकृतमृगं,	नार.,	३१७	न तत्र रोपयेत्किञ्चित्,	कात्या.,	४५५
न च मिथ्यामिशुञ्जीत,	नार.,	३३२	न तत्र विद्यते किञ्चित्,	मनु.,	३४७
न च लाभोऽर्धमासाद्य,	नार.,	४३४	न तत्र विद्यते दोषः,	बृह.,	३५५
न च वासांसि वासोभिः,	मनु.,	५२६	न तत्र विषमं भागं,	मनु.,	६५५
न चादत्त्वा कनिष्ठेभ्यो	,,	६५०	न तत्र स्वामिनो दोषः	नार.,	४६६
न चाद्यैः कालसंरोधात्,	मनु.,	२९८	न तत्रान्या क्रिया प्रोक्ता,	कात्या.,	३५४
न चान्यत्कारयेत्कर्म,	नार.,	३८४	न तत्सिद्धिमवाप्नोति,	बृह.,	१७४
न चार्तिमृच्छति क्षिप्रं,	,,	२५७	न तत्सुतस्तत्सुतो,	याज्ञ.,	१८२
न चार्थसिद्धिरुपभयोः,	कात्या.,	७२	न तद्द्याद्विष्णवाच्च,	,,	३६०
न चादूतो वदेत्किञ्चित्,	याज्ञ.,	८२	न तद् व्यभिचरेद्राज्ञां,	नार.,	५१४
न चेत्त्रिपक्षात् प्रब्रूयात्,	मनु.,	८०	न तलं विद्यते व्योम्नि,	,,	१६
			न तस्य प्रतिमोक्षोऽस्ति	,,	३८९
			न तस्य वेतनं दद्यात्.	मनु.,	४०४

न तस्यान्येन कर्तव्यं,	कात्या., ५५
न तस्थोत्पादयेत्तुष्टिं,	मनु., ५५८
न तु चारणदारेषु,	बौधा., ५९०
न तु दृष्टं छलं राजा,	नार., १६
न तु नामापि गृहीयात् ,	मनु., ६३६
न तु पक्षान्तरं गच्छेत् ,	यम., १०
*न तु पापीयसो जीवनम् ,	गौत., १४६
*न तु स्त्री पुत्रं,	वसि., ७३१
*	,, ३७५
”	,, ८३२
न तैः समयमन्विच्छेत् ,	,, ८३२
*न त्वकामे पितरि	श.-ली., ६५१
न त्वङ्गमेदं विप्रस्य,	हारी., ७८३
न त्वहोढान्विताश्चोरा,	नार., ५४१
*न त्वेकं पुत्रं,	वसि., ७३१
न त्वेवाधौ सोपकारे,	मनु., २९३
”	,, २९८
न दग्धः सर्वथा यस्तु,	विष्णु., २३३
न दग्धश्चेच्छुद्धिमियात् ,	बृह., २५३
न दत्तं स्त्रीधनं यासां,	याज्ञ., ६५४
न दद्यादुत्तरं यावत् ,	बृह., ६२
न दद्यादणवदाप्यः,	कात्या., ३७७
न दद्याददि तस्मात् स,	मनु., ३४२
न दातव्यं तु पुत्रेण,	व्यास., ३१६
न दाता तत्र दण्ड्यः स्यात् ,	कात्या., ३८१
न दिव्यैर्साक्षिभिर्वापि,	,, १७३
नदीतीरे प्रकुरते,	बृह., ४५१
नदीतीरेषु तद्वियात् ,	मनु., ७८९
नदीनां संगमे तीर्थे,	नार., ५७८
नदीषु नातिवेगेऽनु,	नार., २३६
नदीष्ववेतनस्तारः,	,, ८०३
नदीसन्तारकान्तरा,	,, ५३
नदीस्रोतःप्रवाहेण,	बृह., ४५१
न दृष्टं यच्च पूर्वेषु,	नार., ७७४
न दृष्टदोषः वर्तव्या,	मनु., १०८
न देयं तेषु दिव्यं,	कात्या., २०८
*न देवभृत्यातिथिभ्यो,	श.-लि., ६२१
न दोषं प्राप्नुयार्हिकचित् ,	मनु., ५८१

नद्योत्सृष्टा राजदत्ता,	बृह., ४५०
न द्वितीयश्च साध्वीनां,	मनु., ६३७
न धुनेद्यः कराग्रं तु	कालि-पु., २५२
*न नास्तिकेभ्यः कोशो,	विष्णु., २०७
न निन्यैर्नापि समूहैः,	कात्या., ११३
न निषेधोऽल्पबाधस्तु,	याज्ञ., ४५७
न निर्हारं स्त्रियः कुर्युः,	मनु., ६८३
*न निक्षेपोपनिधि,	श.-लि., ७५२
न निष्कयविसर्गाभ्यां,	मनु., ७३८
*न परपुरुषमभिभाषेत्,	श.-लि., ६२२
न परेण समुद्दिष्टान् ,	ना.-का., ८१
न पातयेत्तामप्राप्य,	नार., २३१
न पुनर्द्विविधः प्रोक्तः,	,, ३४०
न प्रतिग्रहभूदेया,	बृह., ७०२
न प्रावृषि विषं दद्यात् ,	नार., २०४
न प्रेषिते त्वलंकुर्यात् ,	हारी., ६३२
न बन्धनं न वैरूप्यं,	यम., ६१८
न बान्धवा न सुहृदो,	नार., १३४
न बान्धवो न चारातिः,	नार., ११८
*न बालस्त्रीधनानि,	श.-लि., ७५२
न ब्राह्मणवधाद्भूयान् ,	मनु., ७८३
*न ब्राह्मणस्य कोशं,	विष्णु., २०१
*न ब्रूयादक्षरसमं,	नार., १५१
न भर्ता नैव च सुतो,	कात्या., ६८६
*न भर्तारं द्विष्यात् ,	श.-लि., ६२७
*न भर्तुः प्रतिकूलमाचरेत् ,	,, ६२३
न भाषणं परस्त्रीभिः,	मनु., ५२२
*न भिन्नकर्षापणमस्ति शुल्कं,	वसि., ५१९
न भुङ्क्ते यः स्वमाधानं,	बृह., ३००
न भोक्तव्यो बलादाधिः,	मनु., २९३
न भोगं कल्पयेत् स्त्रीषु,	कात्या., १९०
न भ्रातरो न पितरः,	नार., ७१७
न मज्जनीयं स्त्रीबालं,	कात्या., २०६
न मण्डलमतिक्रामेत् ,	नार., २२५
”	नार.-पिता., २३१
न मयैतत्कृतं लेख्यं,	व्यास., ९६
न मर्कटे न च तत्स्वामी,	नार., ४९५

न मर्यादासु तिष्ठन्ति,  
 न माता न पिता न स्त्री,  
 \*न मातापितरावतिक्रमेत्,  
 \*न मातापित्रोरन्तरं,  
 न मातृतो ज्यैष्ठ्यमस्ति,  
 न मान्यते यः क्षमते,  
 न मायाभिहितं, कार्यं,  
 न मोक्तव्याः प्रयत्नेन,  
 न यत्तथानुमानेन,  
 न याचते च ऋणिकं,  
 न याचते यः कश्चित्,  
 न युक्तियोगाधोऽर्थेषु,  
 नयेच्छुद्धिं न यः कूर्तं,  
 नयोपधाभिश्चित्राभिः  
 न योषित्पतिपुत्राभ्यां,  
 नरकेषु ते शैश्वर्यं,  
 नरहर्ता हस्तपादौ च,  
 न राज्ञा तु विशिष्टेन,  
 न राज्ञो धृतदण्डं च,  
 नर्तकानामेष एव,  
 नर्मदत्तं तथैतैर्यत्,  
 न लङ्घयेत्पशुर्नाश्वो,  
 न लुप्यते तस्य भागः,  
 न लेखकेन लिखितं,  
 न लेखयति यस्त्वेनं,  
 नवभागं सहोदश्वं,  
 न वर्धते प्रपञ्चस्य,  
 नव सप्त पञ्च वा स्युः,  
 \*न वास्तुविभागो,  
 न विब्रूयान्नुषो धर्मं,  
 न विवाहविधायुक्तं,  
 न विषं विषमित्याहुः,  
 न कृथा शपथं कुर्वन्,  
 न वृद्धिः प्रीतिदत्तानां,  
 \*न वृद्धिः स्त्रीधनलामे,  
 न वृद्धो न शिशुः नैको,  
 \*न वैष्टिकं जाडिष्कं,

महाभारत., ६०७  
 मनु., ५६१  
 श.-लि., ५६१  
 ,, ५६१  
 मनु., ६६०  
 नार., ४९६  
 कात्या., ८२  
 बृह., ५७१  
 मनु., १५  
 बृह., १७४  
 ,, ३६९  
 ,, ३९  
 कात्या., १६८  
 नार., ५४३  
 याज्ञ., ३१६  
 नारद., १९४  
 व्यास., ५२८  
 कात्या., ४६  
 नार., ४८१  
 बृह., ३७१  
 ,, ३७९  
 नार., ४६३  
 बृह., ७५५  
 कात्या., १६८  
 बृह.-कात्या., ५०  
 ब्रह्म-पु., ७११  
 व्यास., २९१  
 बृह., १०२  
 श.-लि., ६७८  
 मनु., ३२  
 ,, ६४२  
 बौधा., ७५२  
 मनु., २५७  
 नार., २८७  
 संवर्त., २९१  
 मनु., १११  
 श.-लि., ८०४

न शक्यतेऽधुना कर्तुं,  
 न शक्यो न्यायतो नेतुम्,  
 \*न शरीरो ब्राह्मणदण्डः,  
 न शरीरो ब्राह्मणस्य,  
 न शीते तोयसिद्धिः स्यात्,  
 \*न शूद्रापुत्रो,  
 न शूद्रायाः स्मृतः कालो,  
 न शौचन्ति यत्रैता,  
 नश्यते विनिपाते तु,  
 न श्रमार्तो न कामार्तो,  
 न श्रोत्रियो न लिङ्गस्थो,  
 \*न श्लेष्मव्याध्यर्दितानां,  
 नष्टं विजग्धं कृमिभिः,  
 नष्टः प्रव्रजितः क्लीबः,  
 नष्टस्यान्वेषणे कालं,  
 नष्टापटतमासाद्यं,  
 नष्टा या पालदोषेण,  
 नष्टे मृते प्रव्रजिते,  
 नष्टे मृते वा ऋणिके,  
 नष्टो देशे विनष्टश्च,  
 न स तं प्राप्नुयात्कामं,  
 ,,  
 न सन्ति यस्य राष्ट्रेषु,  
 न सन्ति साधवो यत्र,  
 न स राज्ञा नियुक्तव्यो,  
 न साक्षी नृपतिः कार्यो,  
 न सा देया न च ग्राह्या,  
 न सावयं न च न्यूनं,  
 न सा सभा यत्र न सन्ति,  
 न साहसिकदण्डघ्नौ,  
 \*न स्तनौ विवृतौ कुर्यात्,  
 \*न स्त्रीकृतं पतिपुत्रौ,  
 न स्त्रीणामुपभोगः स्यात्,  
 न स्त्री पतिकृतं दद्यात्,  
 न स्त्रीभ्यो बालदासेभ्यः,  
 \*न स्थावरमाधिमृते वचगात्,  
 न स्वर्गाल्छ्यवते लोकात्,

बृह., ६४४  
 मनु., ७९४  
 गौत., ५३९  
 यम., ५७३  
 नार., २०४  
 श.-लि., ७०४  
 नार., ६४२  
 मनु., ६१०  
 मनु., ३४२  
 ,, ११२  
 ,, १११  
 विष्णु., २०६  
 मनु.-नार., ४१६  
 देव., ६४१  
 बृह., ३०७  
 याज्ञ., ३५०  
 नार., ४६६  
 बृह., ६३७  
 ,, २९९  
 याज्ञ., २९४  
 नार., ३९०  
 ,, ७६६  
 यम., ७८६  
 कात्या., २०८  
 मनु., ३४२  
 ,, १११  
 कात्या., ६४७  
 मनु., ४३७  
 नार., ३८  
 मनु., ६००  
 श.-लि., ६२२  
 विष्णु., ३१६  
 कात्या., १९१  
 नार., ३१८  
 कात्या., २७८  
 विष्णु., २८६  
 मनु., १४६



न स्वातन्त्र्येण कर्तव्यं,  
न स्वामिना निस्सद्योऽपि,  
न स्वामी न च वै शत्रुः,  
\*न हार्य राजादेव,  
न हार्य स्त्रीधनं राज्ञा,  
न हि जातु विना दण्डं,  
न हि तस्यास्ति किञ्चित्स्वं,  
न हि दण्डादस्ति शक्यः,  
न हि प्रत्यर्थिनि प्रेते,  
न हि स्वल्पेन तपसा,  
न हीनपक्षां युवति,

ना

नाभिस्तृप्यति काष्ठानां,  
नाङ्कया राज्ञा ललाटेषु,  
नाज्ञानेन हि युज्यन्ते,  
नातथ्येन प्रमाणं तु,  
\*नाति द्वितीयं जन,  
नातिभाव्यं भुक्तबन्धं,  
नातिसंवत्सरीं वृद्धिं,  
नातिसंवत्सरीमेके,  
नात्यन्तं पीडनीयाः स्युः  
नाथवत्या परगृहे,  
नादण्डयो नाम राज्ञोऽस्ति,  
नाददीत नृपः साधुः,  
नाधिकं दशमाह्वात्,  
नाध्यधीनो न वक्तव्यो,  
नानापरायानुसारेण,  
नानापौरसमूहस्तु,  
नानायुधधरव्रताः,  
नानार्णवसमवाये,  
नानालिपिज्ञौ कर्तव्यौ,  
नानाशास्त्रवचो,  
नानासन्देशहरणात्,  
नानियुक्तेन वक्तव्यम्,  
\*नानृतवचने दोषो,  
नान्तकः सर्वभूतानां,  
नान्तरेणोदकं सस्यं,

मनु., ६१९  
मनु., ३८९  
कात्या., ३०३  
श.-लि., ७५२  
श.-लि., ७५२  
नार., २६९  
मनु., ३९३  
,, ५११  
नार., ११५  
कात्या., ६१२  
,, ५५

महाभार., ६०८  
मनु., ७८५  
कात्या., ४४६  
,, १२०  
गौत., ७३९  
व्यास., २९१  
मनु., २८१  
गौत., २८१  
बृह., ३०७  
नार., ५८२  
मनु., ७७९  
,, ७८७  
,, ७०३  
,, १११  
व्यास., ३५९  
कात्या., ८१०  
,, ,,  
,, ३३५  
बृह., २९  
लक्ष्मी, १  
कात्या., ४०  
नार., ३३  
गौत., १४६  
महाभारत., ६०८  
नार., ४५८

नान्यत्पक्षान्तरं गच्छेत्,  
नान्यथा तत्पुनः कार्यं,  
नान्यदन्येन संसृष्टं,  
नान्यद्भर्तृविद्योगाग्नि,  
नान्यस्मिन्विधवा नारी,  
नान्योत्पन्ना प्रज्ञास्तीह,  
नान्यो धर्मोऽत्र विज्ञेयो,  
नान्वये सति सर्वस्वं,  
नापराद्धे न मध्याह्ने,  
नापृष्टैरनियुक्तैर्वा,  
नाप्राप्तव्यवहारैस्तु,  
\*नावीजं क्षेत्रं फलं,  
नाभिदध्नोदकस्थस्य,  
नाभिमात्रजले स्थाप्यः,  
नाभिमात्रोदकस्थस्य,  
नामियोज्यः स विदुषा,  
नामघाटागमं संख्यां,  
नामजातिग्रहं त्वेषां,  
नारीणां स्वैरवृत्तीनां,  
नारीषु नित्यं शुचिभूषितासु,  
नार्तानां तोयशुद्धिः स्यात्,  
नार्तो न मत्तो नोन्मत्तो,  
नार्थसम्बन्धिनो नाप्ता,  
\*नार्थः सजातीयः,  
नार्याः षडागमं वित्तं,  
नार्याक् संवत्सराद्विंशत्,  
नाविज्ञातो मृहीतव्यः,  
नाविद्यानां तु वैद्येन,  
नाशक्तो धनिने दातुं,  
नाश्रन्ति पितृदेवास्तत्,  
नाश्य आर्यः शूद्रायां,  
नाष्टिकस्तु प्रकुर्वीत,  
नासमवेता अपृष्टाः ब्रूयुः,  
नासहस्राद्वरेत्कालं,  
नासेद्धव्यः क्रियावादी,  
नास्तिकवात्यदाराग्नि,  
नास्तिके दृष्टदोषे च,  
नास्ति सत्यात्परो धर्मो,

नार., ८२  
कात्या., २२  
मनु., ४३७  
ब्रह्म. पु. ६३४  
मनु., ६४२  
मनु., ६३७  
अङ्गिरा., ६३३  
याज्ञ., ३७४  
नार., २४०  
कात्या., १३७  
,, ३१३  
हारी., ७२३  
याज्ञ., २३७  
नार., २३६  
कालि-पु., २३८  
नार., २४८  
बृह., १९२  
मनु-नार., ४८१  
महाभार., ६०७  
विष्णु., ६२१  
नार., २०५  
मनु., ११२  
,, १०८  
श.-लि., ८३३  
,, ७५२  
नार., ३११  
कात्या., ३०३  
,, ६७५  
,, ३०३  
मनु-वि., ६१३  
आप., ५८८  
कात्या., ३५३  
गौत., १३६  
याज्ञ., २००  
बृह., ३३१  
नार., १०९  
,, २०७  
,, १२८

नास्ति स्त्रीणां क्रियामन्त्रैः,	मनु.,	६०५
नास्ति स्त्रीणां पृथग्यज्ञो,	मनु-विष्णु.,	६२७
नास्वतन्त्राः स्त्रियो ग्राह्याः,	कात्या.,	५९४
नाहमेवं पुनर्वक्ष्ये,	कात्या-उशना.,	४७५
"	उशना.,	७७८

## नि

निक्षिपेत्तत्सकुल्येषु,	नार.,	३३७
निक्षिप्तं वा परद्रव्यं,	"	३७०
निक्षिप्तस्य धनस्यैवं,	मनु.,	३४७
निक्षेपं वृद्धिशेषं च,	कात्या.,	२८७
निक्षेपः पुत्रदारं च,	नार.,	३७३
निक्षेपस्याधुना सम्यक्,	बृह.,	३३८
निक्षेपस्यापहतरं,	मनु.,	३४५
*निक्षेपान्वाहितन्यास,	बृह.,	३५०
निक्षेपो नाम तत्प्रोक्तं,	नार.,	३३८
निक्षेपोपनिधौ नित्यं,	मनु.,	३४२
निक्षेपो यः कृतो येन,	"	३४६
निखेयो निश्चलः कार्यो,	नार.,	२१५
निखेयोऽयोमयः शङ्कुः,	मनु-नार.,	४८१
निगूढचारिणश्चान्यान्,	मनु.,	५०९
निगूढ्य दापयेच्चैनं,	"	४२४
निग्रहाद्दण्डवायां च,	नार.,	३९१
*निग्रहानुग्रह,	हारी.,	७७७
निग्रहानुग्रहं दण्डं,	बृह.,	८५
निग्रहानुग्रहाद्वाज्ञः,	बृह.,	५७६
निजधर्माविरोधेन,	याज्ञ.,	४२२
नित्यं दिव्यानि देयानि,	पिता.,	२१३
नित्यं नैमित्तिकं काम्यं,	बृह.,	४२०
नित्यं स्थितस्ते हृषेय,	मनु.,	१३१
नित्यप्रवाहिनी यत्र,	व्यास.,	४४९
नित्यस्नानकृतां वेणीं,	ऋष्यशृङ्ग.,	६२२
निदेशकालादारभ्य,	बृह.,	४५२
निधायोरसि संशुद्धा,	ब्रह्म-पु.,	६३४
*निधिं लब्ध्वा,	विष्णु.,	७९२
*	"	"
"	"	"
निधिर्निष्फलवित्तं च,	बृह.,	७७५

निधीनां तु पुराणानां,	मनु.,	७९३
*निध्यन्वाधियाचित,	गौत.,	३४२
निन्यैव लोके भवति,	मनु.,	६४५
निन्यैव सा स्मृता लोके,	कात्या.,	६४६
निबन्धं दापयेत्तत्र,	"	३०४
निबन्धमावहेत्तत्र,	"	"
निमज्ज्योत्स्नवते यस्तु,	"	२३९
निम्नगापहृतौत्सृष्ट,	नार.,	४४१
निम्नोन्नता च ध्वजिनी,	व्यास.,	४४८
निम्नोपलक्षिता सा तु,	"	४४९
नियच्छेयुर्मृतिं यां तु,	मनु.,	४०२
*नियतं क्षेत्रिणा,	श.-लि.,	७४०
नियन्ता चात्मदोषाणां,	हारी.,	७४२
*नियमातिक्रमिणमन्यं,	आप.,	७८६
नियुक्तश्चाच्यदण्ड्यानां,	विष्णु.,	५६९
नियुक्ता गुरुभिर्गच्छेत्,	नार.,	६३९
*नियुक्तायां सपिण्डे,	विष्णु.,	७२१
नियुक्तायामपि पुमान्,	मनु.,	७४३
नियुक्तेन च वक्तव्यं,	नार.,	३३
नियुक्तैरपि विज्ञेयं,	कात्या.,	२८
नियुक्तो गुरुभिर्गच्छेत्,	नार.,	६४०
नियुक्तोवाऽनियुक्तो वा,	नार.,	३३
"	बृह.,	३४
नियुक्तो व्यवहारेण,	कात्या.,	३२
नियोगात्पावनं कुर्यात्,	"	६४३
नियोजयत्यपत्यार्थं,	मनु.,	६४३
निरन्वयं भवेत्स्तेयं,	"	५०५
निरन्वये शतं दण्ड्यः,	मनु-नार.,	५३४
निरन्वयोऽनपसरः,	मनु.,	३५२
निरस्तं लिखितं यत्तु,	कात्या.,	२६६
निरस्ता तु क्रिया यत्र,	"	१६०
"	"	२६६
निराकुलावबोधाय,	नार.,	६३
निरादिष्टधनश्चेत्तु,	मनु.,	३०६
निरामयान्यः कुरुते,	बृह.,	३३
निराया व्ययवन्तश्च,	याज्ञ.,	५४४
*निरिन्द्रिया अदायाश्च,	वौधा.,	६७२

निरिन्द्रया ह्यमन्त्राश्च,	मनु., ६०५	निवासं कारये द्विप्रं,	कात्या., ३९०
*निरुदकस्तरो,	वसि., ७८८	निवासश्च स विज्ञेयः,	बृह., ९९
निरुद्धो दण्डितश्चैव,	कात्या., ३०३	निवृत्तं चापि रमणे,	नार., ६५३
निरुध्यमानं प्रश्नं च,	मनु., ८०	निवेदितस्याकथनं,	बृह., ८३
निरोद्धव्या च ताड्या च,	कात्या., ६४७	निवेद्य दद्याद्विप्रेभ्यः,	याज्ञ., ८०६
निरोधनेन बन्धेन,	मनु., ७८२	निवेशकाले कर्तव्यः,	बृह., ४३९
निर्गच्छंस्तृणकाष्ठानि,	नार., ४११	निवेशसमयाद्धूर्ध्वं,	कात्या., ४५३
निर्गच्छतस्तस्य दारु,	व्यास., ४११	निवेश्य कालं वेधं च,	,, ६०
निर्गते तु यदेतस्मात्,	नार., ५५२	निवेष्टकामो रोगार्तो,	नार., ५४
निर्णयं तु यदा कुर्यात्,	कात्या., २६२	निशोपधिबलात्कार,	बृह., १६३
निर्णयन्त्वन्यथा कुर्युः,	,, ३६	निश्चयं स्मृतिशास्त्रस्य,	कात्या., १६०
निर्णयं भावितौ दद्यात्,	याज्ञ., २६३	निश्चितं लोकसिद्धं च,	कात्या-बृह., ६१
निर्णयं सा तु राजाज्ञा,	बृह., २६२	निश्चित्य बहुभिः सार्धं,	बृह., २६८
निर्णयश्च यथा तस्य,	कात्या., १६०	निषादः शूद्रकन्यायां,	मनु., ८१३
निर्णिकं तु तयोस्तत्र,	,, ७३	*निषाद इत्येके,	उशना., ८१४
निर्णोते व्यवहारे तु,	बृह-कात्या., १०१	निषाद एकपुत्रस्तु,	देव., ७०२
निर्दया निर्नमस्काराः,	मनु., ७८५	निषादस्त्री तु चण्डालात्,	मनु-विष्णु., ८२२
निर्दिष्टेष्वर्थजातेषु,	नार., १५१	*निषादाच्छूद्रायां,	बौधा., ८१९
निर्दोषं दर्शयित्वा तु,	नार., ४३२	*निषादाचूतीयायां,	,, ८२०
निर्दोषं नोद्धत्तं पुत्रैः,	कात्या., ३०९	*निषादानां वागुरायाश्च,	श.-लि., ८३०
निर्दोषं परित्यजनन्पत्नीं,	विष्णु., ६१५	*निषादेन निषाद्यामा,	बौधा., ८२५
निर्धनं ऋणिकं कर्म,	बृह., ३२६	निषादो मार्गवं सूते,	मनु-विष्णु., ८२२
निर्धना प्राप्तदोषा स्त्री,	कात्या., ८०३	निषिद्धो भाषमाणस्तु,	मनु., ५८२
निर्धना बन्धने स्थाप्या	,, ८०१	निष्कारणं न गच्छेत्तु,	मत्स्यपु., ५६२
निर्धनैरनपत्यैस्तु,	,, ३२०	निष्कुला याश्च पतिताः,	कात्या., ५५
निर्भयं वा भवेद्यस्य,	मनु., ५११	निष्कृतीनामकरणम्,	बृह., ७७५
निर्वाते वृष्टिरहिते,	नार., २२१	निष्ठुराश्लीलतीव्रत्वात्,	नार., ४७१
निर्वासनं विरोधेऽपि,	बृह., ७८१	निष्पद्यन्ते च सस्यानि,	मनु., ७८७
निर्वासनाङ्गने मौण्डयं,	बृह., ७८४	निष्पाद्यमानं यैर्दृष्टं,	कात्या., ४४८
निर्वास्या व्यभिचारिण्यः,	याज्ञ., ६६८	निसृष्टाः कृत्यकरणे,	,, २७५
निर्विकारे दिनस्यान्ते,	पिता., २३२	निसृष्टार्थस्तु यो यस्मिन्,	,, २७६
निर्विकारो दिनस्यान्ते,	पिता., २४३	निस्तार्थं वासकान्तरात्,	,, ६४७
निर्विशङ्केन तेषां तु,	पिता., २३२	निहितानि तथान्यानि,	बृह., ४४०
निर्वृत्तव्यवहाराणां,	नार., ९१	निहिता यत्र दृश्यन्ते,	व्यास., ४४९
निर्वृत्ते व्यवहारे तु,	,, ९०	निह्वे तु यदा वादी,	व्यास., २६४
निवर्त्य तत्प्रमाणं स्यात्,	कात्या., १६९	निह्वे भावितो दद्यात्,	याज्ञ., ३३२
निवार्याः स्युः प्रयत्नेन,	नार., ४६९	निह्वेते लिखितं नैकं,	याज्ञ., २६५

## नी-न्य

नीत्वा भोगं न यो दद्यात् ,	मत्स्यपु., ४१०
नीवीस्तनप्रावारणमूह,	याज्ञ., ५८०
नृत्यादिकं तु तच्छिक्षन् ,	बृह., ३८३
नृपद्रोहप्रवृत्तानां,	कात्या., २११
नृपद्रोहे साहसे च,	बृह., ९४
नृपार्थेष्वभिशापे च,	याज्ञ., २००
नृपाधिकृतसभ्याश्च,	बृह., २६
नृपाश्रयं प्रवक्ष्यामि,	,, ७७३
नृपाश्रयास्तथा चान्ये,	,, ७६९
नृपेपश्यति तत्कार्यं,	कात्या., १०१
नृपोऽध्यक्षस्तथा ग्रामः,	बृह., ९९
नृन् प्रशंसत्यजस्रं यो,	मनु-विष्णु., ८२१
*नेत्रकन्धराबाहुसकथ्यंसभङ्गे,	विष्णु., ४८९
नेत्ररुग्गलरोगश्च,	कात्या., २४८
नेत्रवक्त्रविकारेण,	मनु., ७७
नैकः समुजयेत्सीमां,	नार., ४४५
नैगमस्येस्तु तत्कार्यं,	कात्या., २३
नैगमाद्या भूरिधना,	व्यास., ५२७
नैगमा वैद्यकितवाः,	बृह., ५०७
नैता रूपं परीक्षन्ते,	मनु., ६०४
नैव रिक्थी न रिक्तश्च,	कात्या., ३०३
नैवाङ्गनानां दयितो,	रामायण., ६०७
नैवान्तरिक्षाज दिवो,	नार., ५४५
नैष चारणदारेषु,	मनु., ५८३
*नोच्छिष्टा देवागारं प्रविशेत् ,	हारी., ६२४
नोत्कृष्टं चापकृष्टेस्तु,	कात्या., १०६
नोत्पादकः प्रजाभागी,	मनु., ७३८
नोत्पादयेत् स्वयं कार्यं,	,, ४६
नोद्विवाहिकेषु मन्त्रेषु,	मनु., ६४२
नोपभोगे बलं कार्यं,	बृह., १८३
नोपस्थितो यदा कश्चित् ,	,, ८४
न्यङ्गावगुरणं वाचा,	कात्या., ४७२
न्यायं वा नेच्छते कर्तुं,	बृह-कात्या., ५०
न्यायमार्गादपेतं तु,	कात्या., ३५
न्यायशास्त्रमधिक्रम्य,	,, ३६
न्यायशास्त्रविशेषेन,	,, २५९

न्यायस्थाने येऽधिकृता,  
न्यायाङ्गान्यग्रतः कृत्वा,  
"  
\*न्यायधिगमे तर्को,  
न्यायान्पश्येत् कृतमतिः,  
न्यायापेतं यदन्येन,  
न्यासं कृत्वा ततश्चार्थं,  
न्यासदोषेण नाशः स्यात् ,  
न्यासद्रव्यं न गृहीयात् ,  
न्यासद्रव्येण यः कश्चित् ,  
न्यासवत्परिपाल्योऽसौ,  
न्यासादिकं परद्रव्यं,  
न्यासापह्नवे चैव,  
न्यासे याचितके दत्ते,  
न्यूनमभ्यधिकं चार्थं,

व्यास., ५२१  
बृह., २५  
", ४४  
गौत., १२  
बृह., २७  
नार-कात्या., ११  
बृह., ७७२  
कात्या., ३४९  
बृह., ३४०  
", ३४४  
", २९३  
कात्या., ३४९  
नार., ९५  
कात्या., ६७  
नार., १५१

## प

पक्वाभानां कृताभानां,  
पक्वाभानां च सर्वेषां,  
पक्षद्वयं साधयन्तीं,  
पक्षद्वयाभिसंधानात् ,  
पक्षद्वयावसाने तु,  
पक्षस्य व्यापकं सारं,  
पक्षार्थं दूष्य मौनं च,  
पक्षैकदेशे यत्सत्यं,  
\*पक्षशैवालुदुष्टग्राह,  
पञ्चकं तु शतं दाप्यः,  
पञ्चकृष्णलको माषः,  
पञ्चग्रामी बहिः कृष्टात् ,  
पञ्चस्वापस्तु नारीणां,  
पञ्चधा वा भवेत्कार्यं,  
पञ्चनद्याः प्रदेशे तु,  
पञ्च पञ्चनृते हन्ति,  
"  
पञ्चबन्धो दमस्तत्र,  
पञ्चमं त्विन्द्रदैवत्यं,  
पञ्चमः क्रीतकः पुत्रो,  
पञ्चमस्तु भवेद्भागः,

नार., ५३६  
मनु., ५३५  
कात्या., ९०  
नार., ४२  
", ६०४  
नार., प्रजा., ६८  
बृह., ८३  
कात्या., ७२  
विष्णु., २३६  
याज्ञ., ३३४  
मनु., ८०८  
याज्ञ., ५५२  
बृह., ६३७  
महाभा., ६९८  
नार., ८०९  
बौधा., १२९  
मनु-नार., १३३  
याज्ञ., ३५४  
बृह.-पिता., २२४  
यम., ७१४  
महाभार., ६९८

पञ्चमाषस्तु विंशत्यां,	बृह.,	२७८	पतिताप्तार्थसम्बन्धि,	याज्ञ.,	११२
*पञ्चमाषा गवि,	गौत.,	४६५	पतिप्रियहिते युक्ता,	,,	६२९
पञ्चरात्रे पञ्चरात्रे	मनु.,	५१७	पतिमुखङ्गय मोहात्तु,	कात्या.,	६३०
पञ्चवर्षावसंघं तु,	नार.,	४५९	पतिभार्या संप्रविश्य,	मनु.,	६०९
पञ्चाशत् भवेद्दण्डः,	मनु.,	५०२	पतिर्हि दैवतं स्त्रीणां,	श.लि.,	६२७
पञ्चाशत्पणिको दण्डः,	याज्ञ.,	५६०	पतिलोकं न सा याति,	याज्ञ.,	६३१
पञ्चाशत्पलिकं भूयः,	नार.,	२२७	पतिलोकमभीप्सन्ती,	मनु.,	६२८
पञ्चाशत्स्त्वभ्यधिके,	मनु.,	५३३	पतिव्रता तु या साध्वी,	हारी.,	६३६
पटे वा ताम्रपट्टे वा,	याज्ञ.,	१५८	पतिव्रतानां ग्रहमेधिनीनां	वसि.,	६३०
पणं याने तं दद्यात्,	मनु.,	७८१	पतिव्रतासु च स्त्रीषु,	मनु.,	६८५
पणक्कीडावयोमिश्च,	नार.,	७६१	पतिशुश्रूषयैव स्त्री,	कात्या.,	६२९
पणाः शूद्रे भवेद्दण्डः,	मनु.,	५६४	परनी दुहितरश्चैव,	याज्ञ.,	७५०
पणानां ग्रहणं तत्स्यात्,	कात्या.,	७९८	*पत्नी वा ज्येष्ठा,	पैठी.,	७४८
पणानां द्वे शते सार्धे,	मनु.,	८०७	पत्युरप्यभियोगिन्या,	कात्या.,	६२६
पणानेकशके दद्यात्,	याज्ञ.,	५५४	पत्यौ जीवति नारीणां,	देवल.,	३९३
पणान् दाप्यः पञ्चशतैः,	याज्ञ.,	५५८	पत्यौ जीवति यः स्त्रीभिः,	मनु.वि.,	६८३
पणैर्निबद्धः पूर्वस्यां,	नार.,	८०९	पत्यौ जीवति या योषित्,	विष्णु.,	६२८
पण्यं गृहीत्वा यो मूल्यं,	कात्या.,	२८७	पत्यौ जीवति वृत्तायाः,	मनु.,	६८८
पण्यं भवेद्विष्टं तत्,	व्यास.,	४३३	पत्रं कारयते यस्तु,	बृह.,	१५४
*पण्यं वणिग्भिर्धार्पाचयेन,	गौत.,	५१७	पत्रद्वये लेखनीयौ,	बृह.,	२५४
पण्यमूल्यं भृतिन्यासो,	नार.,	२९०	पत्रेऽभिलिखितान् सर्वान्,	व्यास.,	१२१
पण्यमूल्यं भृतिस्तुष्टया,	,,	३७८	पत्न्येव दद्यात् तत्पिण्डं,	बृह-मनु.,	७४५
पण्यस्योपरि संस्थाप्य,	याज्ञ.,	५१७	पथि क्षेत्रे परिश्रुते,	मनु.,	४६३
पण्येषु हीनं क्षिपतः,	,,	५१४	पथि क्षेत्रे वृत्तिः कार्या,	नार.,	४६३
पतनं क्रियते यत्र,	कात्या.,	९५	पथिग्रामं विवीतान्ते,	याज्ञ.,	४६२
पतनीयकृते क्षेपे,	याज्ञ.,	४८२	पथि ग्रामे विवीतान्ते,	विष्णु.,	४६२
*पतनीये कृते कर्मण्यनन्तरो,	विष्णु.,	६६९	पथि विक्रीय तद्गण्डं,	बृह-मनु.,	४०७
पतनीयैरुपक्रोशैः,	नार.,	४७२	पदं तदष्टादशविधं,	उशना.,	४६
पतिं वा नामिचरति,	मनु.,	६२९	पदाङ्गसहितस्त्वेष,	बृह.,	२७७
पतिं शुश्रूषते येन,	मनु-विष्णु.,	६२७	पदान्यष्टादशैतानि,	मनु.,	४३
पतिं हित्वा निवृष्टं स्वं,	मनु.,	६४५	परं निरस्य यल्लब्धं	कात्या.,	६७७
पतितं पतितेत्युक्त्वा,	नार.,	४८४	परगात्रेष्वभिद्रोहो,	नार.,	४८५
पतितः तत्सुतः क्लीबः,	याज्ञ.,	६६७	परक्षेत्रस्य मध्ये तु,	,,	४५७
पतितः पतितापत्यं,	देव.,	६६८	परतन्त्रास्तु ये केचित्,	कात्या.,	८००
पतिप्री च विशेषेण,	वसि.,	६१८	परतो व्यवहारज्ञः,	नार.,	२७५
*पतितक्षीबाचिकित्सरोग,	विष्णु.,	६६८	परत्र भीरुं धर्मिष्ठं,	कात्या.,	२४
पतितस्य धनं हत्वा,	यम.,	७८७	परदाराभिर्मर्यै च,	कालिकापु.,	२११

परद्वाराभिर्मर्षेषु,  
परद्वाराभिशापे च,  
परदारे सवर्णासु,  
परदेशोद्धृतं द्रव्यं,  
परद्रव्यगृहाणां च,  
\*परनिहितं स्वनिहितम्,  
परपूर्वस्त्रियै यत्तु,  
परपूर्वाः स्त्रियस्त्वन्याः,  
परपूर्वाश्रिता यत्र,  
परभक्तप्रदानेन,  
परभूमिं हरन् कूपः,  
परभूमौ गृहं कृत्वा,  
परमं यत्नमातिष्ठेत्,  
परमं यत्नमातिष्ठेत्,  
\*परमं ह्येतद्विषं यत्,  
परराष्ट्रात् धनं यत्स्यात्,  
परस्त्रीपानसक्ताश्च,  
परस्परं हस्तपादे,  
परस्परमनीशास्ते,  
परस्परस्य दारेषु,  
परस्परस्य सर्वेषां,  
परस्परस्यानुमते सर्वं,  
परस्परप्रेषात् च,  
\*परस्मात्तस्य,  
\*परस्य पतनीये क्षेपे कृते,  
परस्य पत्न्या पुरुषः,  
परहस्तादुद्धृतं यत्,  
परानीकहते देशे,  
परायत्तशरीराणां,  
परार्थवादी दण्ड्यः स्यात्,  
परश्रयमभव्यं वा,  
परिक्लेशेन पूर्वं स्यात्,  
परिक्षीणे पतिकुले,  
परिपूर्णं गृहीत्वाधि,  
परिभाव्य यदाक्षेत्रं,  
परिभाषणमर्हति,

मनु., ५८४  
कालिकापु., २१०  
यम., ५९८  
कात्या., ५४२  
याज्ञ., ५४४  
विष्णु., ७९१  
कात्या., ३१६  
नार., ६४४  
कात्या., ६४७  
,, ६७७  
याज्ञ., ६५७  
नार., ४११  
मनु., ६०५  
मनु., ५११  
बौधा., ७५२  
कात्या., ३७१  
बृह., ११२  
,, ४८७  
,, ७०६  
मनु-विष्णु., ८२१  
याज्ञ., ४८७  
नार-मनु., ५७९  
नार., ४२६  
गौत., ७३९  
विष्णु., ४८२  
मनु., ५८१  
बृह., ३०८  
व्यास., ५६  
ब्रह्मपु., ७३६  
ना.का., ७६  
कात्या., ३०५  
उशना., ५७१  
नार., ६०४  
बृह., २७८  
,, २९७  
मनु., ४५५

परिभुक्तं तु यद्वासः,  
परिभूतामधःशय्यां,  
परिचारकपत्नीं वा,  
\*परिव्राजकवानप्रस्थ,  
परिशुष्यत्स्खलद्वाक्यो,  
\*परिषद्नामि वा,  
परिहासकृतं यच्च,  
परीक्षकः साक्षिणश्च,  
परीक्षका नियोक्तव्याः  
परीक्षितं तु शपथैः,  
परीक्षेत स्वयं पण्यं,  
परीक्ष्य ज्ञापयन्नर्थान्,  
परीक्ष्य पदमादद्यात्,  
परीक्ष्यामिमत्तं क्रीतं,  
परेण तु दशाहस्य,  
परेण निहितं लब्ध्वा,  
परेण भुज्यमानाया,  
परेभ्यश्च तथा चान्ये,  
परोक्षमर्थवैकल्यात्,  
परोपरुद्धागमने,  
पर्याप्तं दिस्ततस्तस्य,  
पलं सुवर्णाश्चत्वारः,  
,,  
पलायतेऽभियुक्तश्च,  
पलायनानुत्तरत्वात्,  
\*पशुभूमिस्त्रीणामनतिभोगः,  
पशुयोनावतिक्रामन्,  
पशुवत्क्षौद्रधृतयोः,  
पशुवस्त्राजपानानि,  
पशुषु स्वामिनां चैव,  
पशुस्त्रीपुरुषादीनां,  
पशुस्त्रीभूम्युणादाने,  
पशुस्वामिनि दद्यात्,  
पशुहर्तृश्चार्धपादं,  
पशूनां चैव हरणे,  
\*पशूनां पुंस्त्वोपघाती,

नार., ४३७  
याज्ञ., ६१९  
कात्या., ३९९  
श. लि., ११४  
याज्ञ., ७८  
श. लि., ७५२  
नार., ७६६  
बृह., ३५९  
पितामह., २१७  
बृह., २५८  
,, ४३६  
नार., १६  
बृह., ४८  
नार., ४३६  
मनु., ४३०  
नार., ७९२  
याज्ञ., १८६  
व्यास., ९६  
नार-हारी., ३४  
व्यास., ५९९  
कात्या., ३४९  
याज्ञ., ८०८  
मनु., ,,  
नार., ८१  
बृह., २६८  
गौत., १८९  
नार., ५९९  
मनु., १३३  
बृह., ५५७  
मनु., ४१३  
बृह., १८३  
नार., ८३  
मनु., ४१८  
व्यास., ५३१  
मनु., ५३०  
विष्णु., ४९९

पशूनां रक्षणं चैव,	मनु.,	७७६	पापास्तु यस्य राष्ट्राद्वै,	हारी.,	५९३
पशून् गच्छन् शतं दाप्यो,	याज्ञ.,	५९९	पापेन योजयन्दर्पात्,	बृह.,	४८३
पश्चात्कारक्रिया चाथ,	कात्या.,	२६६	पापेषु दर्शयात्मानं,	पिता.,	२२८
पश्चात्कारनिबद्धं यत्,	,,	१६९	,,	,,	२४२
पश्चात्कारे भवेत्तत्र,	,,	१६०	पापोपपापवत्कारो,	व्यास.,	४८२
पश्चात्कारो भवेत्तत्र,	,,	२६६	पाटयो विकारे चाशुद्धो,	कात्या.,	२४६
पश्चाच्च न तथा दद्यात्,	मनु.,	३८०	*पारजायी सवर्णागमने,	विष्णु.,	५८६
पश्चाच्चैवापसारतां,	याज्ञ.,	५०२	पारदाः पल्लवाश्चीनाः,	मनु.,	८२८
पश्चादात्मविशुद्ध्यर्थं,	कात्या.,	३५४	पारदारिकचौरं वा,	याज्ञ.,	५७०
पश्चाद्दृश्येत यत्किञ्चित्,	मनु.,	६९५	पारदारिकवह्णद्वयो,	मत्स्यपुरा.,	५८१
पश्चाद्यः सोऽप्यसत्कारी,	नार.,	४९७	पारयन्तोऽपि ये साक्ष्ये,	विष्णु.,	१४३
पश्चात्प्रतिभुवि प्रेते,	मनु.,	३०६	*पारशवयवन,	गौत.,	८१५
पश्चिमे मण्डले तिष्ठत्,	पिता.,	२२६	*पारशवेन,	पैठी.,	८१९
पश्यतोऽन्यैस्तथा भुक्ता,	व्यास.,	१८५	पारशव्यां क्षत्ता,	,,	,,
पश्यतोऽब्रुवतो भूमैः,	याज्ञ.,	१८६	पारित्राज्यं गृहीत्वा,	दत्त.,	३९०
पश्यन्नन्यस्य ददतः,	बृह.,	१८८	पारुष्यं द्विविधं प्रोक्तं,	बृह.,	५७७
पश्येत् पुराणधर्मार्थं,	,,	४४	पारुष्यं मध्यमं प्रोक्तं,	बृह.,	४७३
पाखण्डनैगमश्रेणि,	नार.,	४२२	पारुष्यदोषावृतयोः,	नार.,	४९७
पाषण्डनैगमादीनां,	,,	४१९	पारुष्यं मुत्तमं प्रोक्तं,	बृह.,	४७३
पाणिमुद्यम्य दण्डं वा,	मनु.,	४९१	पारुष्यमुभयं चेति,	नार.,	५५६
पाणिग्राहस्य साध्वी.	,,	६२८	पारुष्ये कूटकरणे,	कात्या.,	७५
पाणौ यश्च निगृहीयात्,	नार.,	५७९	पारुष्ये सति संरम्भात्,	नार.,	४९६
पाण्डुलेखेन फलके,	कात्या.,	६३	पार्थिवश्च गणांश्चैव,	कात्या.,	३२
पातकेष्वमिश्रापे च,	नार.,	२५६	पार्श्वहानिकरीं कृत्वा,	बृह.,	६९६
पादं पशुश्च योविच्च,	मनु.,	७८९	पालः शास्यो भवेत्तत्र,	नार.,	४६३
पादः सभासदः सर्वान्,	मनु-नार.,	३६	पालग्राहे ग्रामघाते,	व्यास.,	४१५
पादकेशांशुककरोल्लुब्धन्,	याज्ञ.,	४८६	पालदोषविनाशे तु,	याज्ञ.,	४१६
पादयोर्दाढिकायां च,	मनु.,	४९१	पालनीया समस्तैस्तै,	बृह.,	४२४
पादवन्दनिकं यत्तत्,	कात्या.,	६९४	पालो येषां न ते मोक्ष्या,	याज्ञ.,	४६८
पादेन प्रहरेत्कोपात्,	मनु.,	४९१	पाषाण्डिनैगमश्रेणि,	नार.,	७७३
पादेनान्वेषणं कुर्युः,	नार.,	५४४	पाह्येन वरुणं त्वं हि,	कालि.पु.,	२३८
पादोऽधर्मस्य कर्तारं,	मनु-नार.,	३६	पिटिकां पूरयेत्तत्र,	नार.,	२१७
पानं दुर्जनसंसर्गः,	मनु.,	६२२	पिण्डं गृहीत्वा संदंशैः,	,,	२३०
पानाटनदिवास्वप्न,	बृह.,	६२३	पिण्डं च विपुरुषं,	स्मृतिः.,	७५३
पानीयाग्निसमायुक्तां,	पिता.,	२१६	पिण्डदोऽशहरश्चैषां,	याज्ञ.,	७१६
पापं पुनासि वै यस्मात्,	पिता.,	२२८	पिण्डोदकक्रियाहेतोः,	बृह.,	७४३
पापमूलं सङ्ग्रहणं,	बृह.,	५७७	पितरस्तस्य नाश्रन्ति,	उशना.,	४६३

मितरि प्रोषिते त्रेते,	याज्ञ.,	३०९	पितृव्येनाथवा प्रीत्या,	बृह.,	७५७
*पितर्यशक्ते कुटुम्ब,	श.लि.,	६५१	पितृणां सूनुमिजातैः,	कात्या.,	३१३
पितर्युपरते पुत्राः,	देव.,	६४८	पितृणामनुणश्चैव,	मनु.,	६५०
पितर्युपरते पुत्राः,	देव.,	३९३	पितेव पालयेत्पुत्रान्,	मनु.,	६५०
पितर्युपरते पुत्राः,	नार.,	३०९	*पितोत्सृजेत् पुत्रिका,	गौत.,	७२७
पितर्यूर्ध्वं गते पुत्राः,	,,	६४९	पित्रा दृष्टमृणं यत्तु,	कात्या.,	३०९
पितरस्त्वबलम्बन्ते,	,,	१३४	पित्रा भर्त्रा सुतैर्वापि,	मनु.,	६१९
पिताचार्यः सुहृन्माता,	मनु.,	७७९	पित्रा भुक्तं तु यद्द्रव्यं,	विष्णु-कात्या.,	१७८
पिताचेत्पुत्रान्निभजेत्,	विष्णु.,	६५४	*पित्रामात्रा च परि,	विरणु.,	७३३
पिता पितामहो यस्य,	व्यास.,	१८०	पित्रा विवदमानश्च,	नार.,	१११
पितापुत्रविरोधे तु,	याज्ञ.,	५६३	पित्रा सह विभक्ता ये,	बृह.,	७०५
,,	,,	५६३	पित्रैव तु विभक्ता ये,	नार.,	६५५
पितापुत्रविवादश्च,	नार.,	७७३	पित्रोर्भावे भ्रतृणां,	बृह.,	६५३
पिता पुत्रस्य जातस्य,	विष्णु., वसि.,	७४२	पित्र्यं द्रव्यं समाश्रित्य,	नार.,	६७५
पितापुत्रस्वसृभ्रातृ,	याज्ञ.,	५६१	पित्र्यं पित्र्यर्णसंबद्धं,	कात्या.,	६७३
पिता प्रधानं प्रजने,	मनु.,	७०९	पित्र्यं वाथ स्वयं प्राप्तं,	बृह.,	३७५
पिता बन्धुः पितृव्यश्च,	कात्या.,	११३	पित्र्यमेवाग्रतो देव्यं,	,,	३०९
पितामहेन यद्वत्तं,	व्यास.,	६७६	पित्र्याहव्यात्समं भागं,	ब्रह्म-पु.,	७२७
पितामहश्च ताः सर्वा,	,,	६६४	पित्र्ये लब्धक्रयाधाने,	बृह.,	१७७
पिता रक्षति क्रौमारे,	मनु.,	६०२	पिप्पलाज्जायते ह्यग्निः,	पिता.,	२२७
पिताऽस्वतन्त्रः पितृमान्,	कात्या.,	२७५	पीडनेनोपरोधेन,	कात्या.,	३२४
पिता हरेदपुत्रस्य,	मनु.,	७४८	पीडयेत्तु धनी यत्र,	कात्या.,	३३०
पितुः स्वसारं मातुश्च,	याज्ञ.,	५८७	पीडयेद्भर्त्सयेच्चैव,	,,	२९५
पितरूर्ध्वं विभजतां,	,,	६६४	पीडाकर्षांशुकावेष्ट,	याज्ञ.,	४८६
पितुर्वा भजते शीलं,	मनु.,	८२८	पीडितः स्वयमायातः,	बृह.,	४७
पितृन्मृक्यहराः पुत्राः,	बृह.,	६६४	पुत्रामा निरयः प्रोक्तः,	हारी.,	७४१
पितृद्रव्याविनाशेन,	याज्ञ.,	६७६	पुत्राम्नो नरकाद्यस्मात्,	बृह.,	७४१
पितृद्विद् पतितः षण्डो,	नार.,	६६८	,,	मनु-विष्णु.,	,,
*पितृपितामहानां,	श. लि.,	७१२	पुंसः कार्योऽधिकायां तु,	बृह.,	५८५
पितृपैतामहं चैव,	कात्या.,	६०	*पुंसां चावार्धवाहं,	वसि.,	७८८
पितृमातृसुतभ्रातृ,	याज्ञ.,	६१९	पुत्रं तु जनयेदेव,	कात्या.,	६४६
*पितृमातृसुतभ्रातृदत्तं,	विष्णु.,	६९३	पुत्रं पुत्रगुणैर्युक्तं,	मनु.,	७३४
*पितृविभक्ता विभागा,	,,	७०६	*पुत्रं प्रतिग्रीह्यन्,	वसि.,	७३१
पितृव्यगुरुदौहित्रान्,	बृह.,	७४६	पुत्रः कनिष्ठो ज्येष्ठायान्,	मनु.,	६५८
पितृव्यभ्रातृपुत्रस्त्री,	,,	३१४	पुत्रः पत्युरभावे वा,	नार.,	२७३
पितृव्यसखिशिष्यस्त्री,	नार.,	५८७	*पुत्रः पितृवित्ता,	वसि., विष्णु.,	७५४
पितृव्येणाविभक्तेन,	,,	३१२	पुत्रदारधनानां च,	बृह.,	२४९



पुत्रदाराश्च चाप्येनं,  
पुत्रदौहित्रयोर्लोके,  
पुत्रपौत्रप्रतिष्ठस्य,  
पुत्रपौत्रैर्ऋणं देयं,  
पुत्रश्च दुहिता चोभौ,  
पुत्राश्चाभक्तदो मातुः,  
पुत्रप्रतिनिधीनाहुः,  
पुत्रवचापि वर्तेरन्,  
पुत्रवत्परिपाल्यं तत्,  
\*पुत्रस्य प्रदानविक्रय,  
\*पुत्रा औरसक्षेत्रज,  
पुत्राणां तु त्रयो भागाः,  
पुत्राणां भर्तेरि प्रेते,  
पुत्राणां मध्यमो दायः  
पुत्रान् द्वादश यानाह,  
पुत्रान् निर्हरणेचापि,  
पुत्रापराधे न पिता,  
पुत्राभावे तु दातव्यं,  
पुत्राभावे तु दुहिता,  
पुत्रा येऽनन्तरस्त्रीजाः,  
पुत्रास्तु द्वादश प्रोक्ता,  
पुत्रास्तु स्थविरे भावे,  
पुत्रास्त्रयोदश प्रोक्ताः,  
\*पुत्रिका पुत्रवदिति,  
पुत्रिकायां कृतायां तु,  
पुत्रिकायाः प्रदाने तु,  
पुत्रिणी तु समुत्सृज्य  
पुत्रे जाते निवर्तेत,  
पुत्रेण च कृतं कार्यं,  
पुत्रेण लोकान् जयति,

पुत्रेण सोऽर्थः संशोध्यो,  
पुत्रेणापि समं देयं,  
पुत्रेणैवापहार्यं तत्,  
पुत्रैः राज्यं समासज्य,  
पुत्रैः सह विभक्तेन,  
पुत्रोऽनन्याश्रितद्रव्यः,

मनु., २५६  
श.-लि., ७४२  
श.-लि., ७४२  
याज्ञ., ३०९  
नार., ७४७  
बृह., ६०४  
मनु., ७३५  
,, ६५०  
बृह., ३४०  
वसि., ३७५  
गौत., ७१२  
कात्या., ६७१  
मनु., ६१९  
देव., ६५७  
मनु., ७१५  
देव., ६८६  
नार., ४९७  
कात्या., ३१०  
नार., ७४७  
मनु., ८१३  
यज्ञ., ७१४  
मनु., ६०२  
बृह., ७३५  
श.-लि., ७२४  
मनु., ७०८  
जावा., ७२७  
नार., ३२३  
,, ६३९  
,, २७२  
श.लि.विष्णु.,  
वसि., हारी., ७४२  
नार., १८४  
कात्या., ३०७  
,, ३२२  
,, ८०६  
बृह., ७०५  
याज्ञ., ३२१

पुत्रोपचारेणात्मानं,  
पुनरारोहयेद्गोहं,  
\*पुनः पत्युर्ग्रहमियात्,  
पुनर्भुवां विधिस्त्वेष,  
\*पुनर्भूः प्रथमा प्रोक्ता,  
,,  
पुनर्भूविधा तासां,  
पुनर्विभागकरणे,  
पुनर्विवादं कुरुते,  
पुनस्तत्र निमज्जत्स,  
पुनाति त्रिकुलं नारी,  
पुमांसं दाहयेत्पापं,  
पुमान्सङ्ग्रहणे ग्राह्यः,  
पुरप्रधानसंभेदः,  
पुरराष्ट्रं विरुद्धश्च,  
पुरस्तान्नवमं यत्तु,  
\*पुराणपञ्चविंशत्यां मासे,  
पुराणानि पवित्राणि,  
पुराणानुमतौ चात्र,  
पुराणे पणिकं मासं,  
पुराणैर्धर्मवचनैः,  
पुरुषं दोषविभवं,  
पुरुषं व्यञ्जयन्तीह,  
पुरुषं हरतो हस्तौ,  
\*पुरुषवधे स्तेये,  
\*पुरुषशक्त्यपराधानुबन्ध,  
पुरुषस्य स्त्रियाश्चैव,  
पुरुषाणां कुलीनानां,  
पुरे राष्ट्रे विरोधः स्यात्,  
\*पुल्कसमागधौ,  
\*पुल्कसानां नगरं,  
\*पुल्कसो वैणो,  
पुल्कस्यां जायते पापः,  
\*पुष्पमाणवकं कर्म,  
पुष्पेषु हरिते धान्ये,  
पूगश्रेणिगणादीनां,  
पूजयेत्कव्यपूताभ्यां,

श.-लि., ७२०  
पिता., २३२  
नार., ६४४  
,, ६४५  
नार., ३१९  
,, ६४४  
,, ६४४  
बृह., ७५७  
,, १२१  
कात्या., २३९  
अङ्गि., ६३३  
मनु., ७८७  
याज्ञ., ५७९  
नार., ७७३  
कात्या., ४९  
बृह.-पिता., २२४  
हारी., २८०  
कात्या., ४५६  
नार., १२८  
हारी., २८४  
नार., १२६  
बृह., ७८१  
मनु., ८२८  
नार., ५२९  
आप., ५४०  
गौत., ७७८  
मनु., ६०१  
मनु., ५२८  
बृह., ४९  
विष्णु., ८१७  
श.लि., ८३०  
पैठी., ८१८  
मनु.-विष्णु., ८२२  
शबर., ८३१  
मनु., ५३४  
कात्या., ९३  
बृह., ७४६

पूजाप्रभावयुक्ताश्च,	पिता.,	२१६	पूर्वा पूर्वा जघन्यासां,	नार.,	६४५
पूजिताश्च प्रशस्ताश्च,	मनु.,	८२४	पूर्वाशनी च या भर्तुः,	,,	६१६
*पूता भवतीति विज्ञायते,	वसि.,	५९२	पूर्वाह्नि तामधिष्ठाय,	बृह.,	४४
पूरयेद्दधृततैलाभ्यां,	पिता.,	२५२	पूर्वाह्नि शीतले देशे,	कात्या.,	२४२
पूर्णाविधौ शान्तलाम्,	बृह.,	३०८	पूर्वाह्नि सर्वदिव्यानां,	नार.,	२१३
" "	,,	३२७	पूर्वाह्नि सोपवासस्य,	नार.,	२४६
पूर्णे प्रकर्षे तत्स्वाम्यं,	,,	२९९	पूर्वाकादुक्तशेषं स्यात्,	कात्या.,	७७४
पूर्णेऽवधौ शान्तलाम्,	,,	२९८	पूर्वाक्तेन विधानेन,	नार.,	६४०
पूर्वं कृता क्रिया यातु,	बृह.,	७७१	,,	पिता.,	२४६
पूर्वं पूर्व गुरु ज्ञेयं,	नार.,	१८२	पूर्वोत्तरं वदेद्बन्धुः,	बृह.,	७५
पूर्वं मयेयं भुक्तेति,	नार.,	५७९	पूर्वोत्तरक्रियायुक्तम्,	,,	१५९
पूर्वं वा पीडितो वाथ,	कात्या.,	४९७	पूर्वोत्तरे निविष्टे तु,	कात्या.,	७३
पूर्वं पूर्व स्मृतः श्रेष्ठो,	नार.,	७१७	,,	बृह.,	८४
पूर्वकर्मापराधी च,	याज्ञ.,	५४४	पूर्वोत्तरेऽभिलिखिते,	,,	८५
पूर्वदृष्टेषु चिह्नेषु,	नार.,	२३२	पूर्वोत्तरोऽभिलिखिते,	,,	७६
पूर्वपक्षं लेखयतो,	बृह.,	६१	पूर्वोत्थानं गुरोरर्वाक्,	,,	६२०
पूर्वपक्ष स्वपक्षोक्तं,	कात्या.,	६३	पूर्वोत्थानपरा दक्षा,	व्यास.,	६१४
पूर्वपक्षः स्मृतः पादः,	बृह.,	४५	पृथक्कर्मगुणोपेताः,	नार.,	७५९
पूर्वपक्षश्चोत्तरं च,	कात्या.,	४५	पृथक् पृथक् दण्डनीयाः,	याज्ञ.,	१४२
पूर्वपक्षश्रुतार्थस्तु,	नार.-कात्या.,	६७	पृथगायव्ययधनाः,	बृह.,	७५९
पूर्वपक्षार्थसंबन्धः,	नार.-कात्या.,	६७	पृथग्गणांश्च ये सिन्धुः,	नार.,	४२४
पूर्वपक्षेऽधरीभूते,	याज्ञ.,	८८	पृथग्विवर्धते धर्मः,	मनु.,	६५१
पूर्वपक्षे यथार्थं तु,	बृह.,	७२	पृष्ठतो वानुगन्तव्यं,	कात्या.,	३२५
पूर्वपक्षो भवेद्यस्य,	नार.,	८८	पृष्ठस्तत्रापि तद्ब्रूयात्,	मनु.,	१०१
पूर्वप्रमीताग्निहोत्रम्,	बृह.,	७४६	पृष्ठोऽपव्ययमानस्तु,	मनु.,	१०२
पूर्वभुक्त्या च सततं,	मनु.,	४४१	पैतामहं च पित्र्यं च,	कात्या.,	६७२
पूर्वमङ्गीकृतं तेन,	बृह.,	८३	पैतामहं तु यत्पुत्रैः,	,,	३०९
पूर्वमाक्षारयेद्यस्तु,	नार.,	४९७	पैतामहं समं देयं,	बृह.,	३१०
पूर्वमाक्षारितो दोषैः,	मनु.,	५८१	पैतामहं हतं पित्रा,	,,	६५२
पूर्वमेव रहो गच्छेत्,	ऋष्यशृङ्ग.,	६२२	पैतृकात् पितृद्रव्यम्,	मनु-विष्णु.,	६५२
पूर्ववादं परित्यज्य,	नार.,	८१	पोगण्डाः परतस्तं तु,	कात्या.,	७५३
पूर्ववादस्तयोः पक्षः,	,,	४२	*पोतवाहोपजीवनं,	हारी.,	८३१
पूर्ववृत्तमुत्सृज्य,	,,	४५८	पौरकार्यं हि यो राजा,	रामा.,	१७
पूर्वं वैरानुमानेन,	बृह.,	५७५	पौश्रल्याच्चलचित्तत्वात्,	मनु.,	६०४
पूर्वस्मृतादर्धदण्डः,	याज्ञ.,	५०३	पौण्ड्रकाश्चौडद्रविडा,	,,	८२८
पूर्वस्वामी तु तद्द्रव्यं,	बृह.,	३५०	पौत्रदौहित्रयोलोके,	देव.,	७२५
पूर्वापराधैर्दुष्टो वा,	नार.,	५४५	पौत्री मातामहस्तेन,	देव.,	७२५

पौत्रीमातामहस्तेन,	वसि., ७२९	प्रच्छन्नवच्चका ज्ञेया,	मनु., ५०९
पौत्रोऽथ पुत्रिकापुत्रः,	बृह., ७४१	प्रच्छन्ना वा प्रकाशा वा,	मनु-विष्णु., ८२२
पौनर्भवश्चतुर्थः,	वसि-विष्णु., ७२८	प्रच्छादितं तु यथेन,	कात्या., ६९५
पौनर्भवश्चतुर्थस्तु,	यम., ७१४	प्रजननार्थं स्त्रियः सृष्टाः,	मनु., ६११
पौनर्भवश्च वैश्यानां,	ब्रह्मपु., ७३६	प्रजनार्थं महाभागा,	मनु., ६०९
पौनर्भवस्तु परतो,	,, ७११	*प्रजाः सन्त्वपुत्रिणः,	वसि., ७४३
पौनर्भवोऽपविद्धश्च,	नार., ७१६	प्रजाप्रवृत्तौ नारीणां,	नार., ६४२
पौराणां कर्म कुर्युस्ते,	बृह., ४२०	*प्रजामिरमे अमृ,	वसि., ७४३
प्रकारस्यावभेतारं,	मनु., ५६७	प्रजास्तत्र विवर्धन्ते,	मनु., ७९४
प्रकाशं च क्रयं कुर्यात्,	कात्या., ३५४	प्रजास्तमनुवर्तन्ते,	मनु., ११
प्रकाशं देवं कुर्यात्,	नार., ७६८	प्रजा हि तस्या स्वो धर्मः,	यम., ६३८
प्रकाशं वा क्रयं कुर्यात्,	कात्या., ३५१	प्रजेप्सयाऽधिगन्तव्या,	मनु., ६३९
प्रकाशं सात्तिभिर्भाव्यं,	व्यास., ९४	प्रज्ञासामर्थ्यमायामिः,	बृह., ५०७
प्रकाशकयतः शुद्धिः,	नार., ३५५	प्रज्वालानामिशस्तश्चेत्,	कात्या., २३२
प्रकाशचिन्हान्येतानि,	बृह., ४४७	प्रणम्य देवतामिष्टां	कालि.पु., २३८
प्रकाशतस्करा ह्येते,	बृह., ५०८	प्रणम्य लोकपालेभ्यः,	पिता., २१४
प्रकाशमेतत्तात्कार्यं,	मनु., ७६२	,,	मनु., ७
प्रकाशवच्चकाः सोपधिकाः,	नार., ५०८	*प्रणष्टमस्वामिकमधिगम्य,	गौत., ५५४
प्रकाशवच्चका ज्ञेया,	व्यास., ५०८	प्रणष्टाधिगतं द्रव्यं,	मनु., ५५५
प्रकाशवच्चका ये तु,	बृह., ५७१	प्रणालीं गृहवास्तुं च,	कात्या., ४५३
प्रकाशं विक्रयाद्यस्तु,	कात्या., ३९४	प्रतिकुर्याच्च तत्सर्वं,	मनु., ५६५
प्रकाशश्चाप्रकाशश्च,	बृह., ५०७	प्रतिकूलं च यद्राज्ञः,	नार., ४२६
प्रकाशांश्चाप्रकाशांश्च,	मनु., ७०७	प्रतिकूलं वर्तमानाः,	मनु-विष्णु., ८२१
प्रकाशाश्चाप्रकाशाश्च,	व्यास., ५०७	प्रतिकूलकलत्रस्य,	दक्षः, ६१४
प्रकाशापणसंस्थाश्च,	व्या., ५०८	प्रतिगृह्णाति यो दण्डं,	नार., ३४८
प्रकीर्णकः पुनर्ज्ञेयो,	नार., ७७३	प्रतिग्रहः प्रकाशः स्यात्,	याज्ञ., ३७६
प्रकुर्युः सर्वकर्माणि,	कात्या., ४२२	प्रतिग्रहविलोपश्च,	नार., ७७३
प्रकृतीनां प्रकोपश्च,	बृह., ७७५	प्रतिग्रहपरीमाणं,	याज्ञ., १५८
प्रकृष्टश्च कृतं काले,	बृह., ३७०	प्रतिग्रहाधिक्रीतेषु,	नार., ७७२
प्रक्रान्ते सप्तमं भागं,	याज्ञ., ४०६	प्रतिग्रहे च क्रीते च	मरीचि., १५२
प्रक्रान्ते साहसे वादे.,	कात्या., ९४	प्रतिज्ञां साधयेद्वादी,	बृह., ८७
प्रक्षाल्य पाययेत्तस्मात्,	बृह., २४६	प्रतिज्ञा दोषनिर्मुक्तं,	कात्या.-बृह., ६१
प्रक्षिप्य कुम्भेवेतानि,	बृह., ४४१	प्रतिज्ञाभावनाद्वादी,	बृह., २६६
प्रख्यातकुलशीलाश्च,	कात्या., १०६	प्रतिज्ञार्थं स्थिरीभूते,	बृह., ६४
प्रख्यापनार्थं पापस्य,	यम., ७८६	प्रतिज्ञानं तथैवास्त्य,	नार., ३४०
प्रगृह्य चिह्नमावेद्य,	कात्या., ५४१	प्रतिपत्तौ न साक्षित्वं,	व्यास., १२२
प्रच्छन्नं वा प्रकाशं वा,	मनु., ७६२	प्रतिपन्नं स्त्रिया देयं,	याज्ञ., ३१८

प्रतिपन्नमृणी दाप्यः,  
 प्रतिपन्नस्य धर्मोऽयं,  
 प्रतियोगिधनाढ्यत्वात्,  
 प्रतिभाव्यं तु यो दद्यात्,  
 प्रतिभूर्दापितो यत्तु,  
 प्रतिमानसमीभूते,  
 \*प्रतिमारामरूप,  
 प्रतिमालेख्यदेवैश्च,  
 प्रतिमासं स्रवति या,  
 प्रतिरूपकराश्चैव,  
 प्रतिरूपस्य कर्तारः  
 प्रतिलामेच्छया दत्तं,  
 प्रतिलोमप्रसूतानां,  
 ,,  
 प्रतिलोमप्रसूता या,  
 प्रतिलोमप्रसूतैषु,  
 \*प्रतिलोमाः,  
 \*प्रतिलोमाः षड्,  
 \*प्रतिलोमादव्यभिचारे,  
 प्रतिलोमानुलोमाश्च,  
 प्रतिलोमापवादेषु,  
 \*प्रतिलोमाश्चार्थं,  
 \*प्रतिलोमासु स्त्रीषु,  
 प्रतिलोमास्तथा चान्याः,  
 प्रतिलोम्यप्रसूतानां,  
 प्रतिवर्णं च सर्वेषां,  
 प्रतिवाच्य कारणं ब्रूयात्,  
 प्रतिवाची न दाप्यः स्यात्,  
 प्रतिवाची प्रपद्येत,  
 प्रतिवादी भवेद्धीनः,  
 प्रतिवादी यदा तत्र,  
 प्रतिवादी स विज्ञेयः,  
 प्रतिशीर्षप्रदानेन,  
 प्रतिश्रुतं तथाऽन्यस्य,  
 प्रतिश्रुतार्थदाने तु,  
 प्रतिश्रुत्य न कुर्याद्यः,  
 प्रतिश्रुत्य प्रदातारं,

बृह., ३२४  
 बृह., ३३०  
 बृह., १६७  
 बृह., ३०७  
 याज्ञ., ३०८  
 याज्ञ., २१८  
 विष्णु., ५६६  
 बृह., ४४  
 नार., २८३  
 नार., ५०८  
 कात्या., ५६९  
 बृह., ३७९  
 कात्या., २०  
 बृह., २०  
 कात्या., ६६९  
 कात्या., २६१  
 गौत., ८१५  
 देव., ८११  
 पैदीन., ८१९  
 बृह., ८११  
 याज्ञ., ४७४  
 विष्णु., ८१७  
 ,, ६६९  
 बृह., ४९९  
 कात्या., २१२  
 नार., २७४  
 कात्या., ७१  
 ,, ७५  
 बृह., २५८  
 कात्या., ७८  
 कात्या., १४९  
 ,, ७५  
 नार., ३९१  
 बृह., ३७३  
 हारी., ३७७  
 बृह., ४०४  
 मस्य.पु., ३७७

\*प्रतिश्रुत्याप्यधर्म,  
 \*प्रतिषिद्धभाण्डनिर्हारे,  
 प्रतिषिद्धमनादिष्टं,  
 प्रतिषिद्धा पित्रेया तु,  
 प्रतिषेधे तयोर्दण्डो,  
 प्रतिष्ठाभिप्रयातश्च,  
 प्रतिष्ठिता पुरे ग्रामे,  
 प्रतिष्ठिताप्रतिष्ठिता,  
 प्रसिंसवत्सरं गोपे,  
 प्रतिहन्यान्न कितवं,  
 प्रतीयास्त्वगृहानेषा,  
 प्रेते तु भोक्तारि धनं,  
 प्रत्यक्षं क्षेत्रिणामर्थो,  
 प्रत्यक्षं चोदयेत्साक्ष्यं,  
 प्रत्यक्षं तत्स्मृतं कार्यं,  
 प्रत्यक्षं दापयेद्विष्यं,  
 प्रत्यक्षं लेख्यते यश्च,  
 प्रत्यक्षलिङ्गाभिव्यक्ते,  
 प्रत्यक्षचारकाणां तु,  
 प्रत्यक्षपरिभोगात्तु,  
 प्रत्यर्थिनोऽप्रतो लेख्यं,  
 प्रत्यर्थिसन्निधानश्च,  
 प्रत्यर्थिसंभ्यानयनं,  
 प्रत्यर्थी दापनीयः स्यात्,  
 प्रत्यर्थी वा मृतो यत्र,  
 प्रत्यर्थी वा सुतस्ताभ्यां,  
 प्रत्यहं गृह्यते या तु,  
 प्रत्यहं देशदृष्टैश्च,  
 प्रत्यहं लोकयात्रायाः,  
 प्रत्यागच्छेत्तु वेगेन,  
 प्रत्युक्तादन्यदव्यक्तं,  
 प्रत्येकैकसमूहानां,  
 प्रथमं कारणं पूर्वं,  
 प्रथमं तत्प्रमाणानां,  
 ,,  
 प्रथमं दण्डपाह्वयं,

गौत., ३७७  
 श. लि., ५१६  
 याज्ञ., ३६०  
 मनु., ६३०  
 याज्ञ., ५८३  
 कात्या., ५५  
 बृह., २६  
 ,, ,,  
 नार., ४१३  
 नार., ७६६  
 नार., ३८३  
 ,, १८४  
 मनु., ७३८  
 कात्या., १२३  
 ,, १३६  
 पिता., २१२  
 बृह., ९९  
 श. लि., १९६  
 नार., ४६६  
 नार., १८६  
 याज्ञ., ६०  
 बृह., १८१  
 बृह., २७  
 ,, ७२  
 कात्या., ११५  
 बृह., ७६  
 बृह., २८५  
 मनु., ७  
 मनु., ६०९  
 पिता, नार., २३८  
 बृह., ७१  
 कात्या., १०७  
 कात्या., ७१  
 बृह., २००  
 मनु., ७७  
 बृह., ४८५

प्रथमं दर्शनं प्रातः,	नार.,	८०३	प्रमाणहीनवादे तु,	बृह.,	३५६
प्रथमं ये मिथो याप्ति,	बृह.,	८४	प्रमाणहीने वादे तु,	बृह.,	१९२
प्रथमं साहसं दद्यात्,	याज्ञ.,	४९५	प्रमाणानि प्रमाणज्ञः,	नार-कात्या.,	९७
प्रथमा धर्मपत्नी तु,	दक्ष.,	६१३	प्रमाणेन तु कूटेन,	कात्या.,	५७०
प्रथमा यत्र मिद्यन्ते,	व्यास.,	९६	प्रमाणैर्हेतुचरितः,	व्यास.,	२५८
प्रथमारोपणे ग्राह्य,	नार.,	२१८	प्रमादहतनष्टांश्च,	याज्ञ.,	४१४
प्रथमे ग्रन्थिर्भेदश्च,	नार.,	५३२	*प्रमादादरण्ये पशून्,	अप.,	५५५
प्रथमेऽहनि तैस्त्वेव,	कात्या.,	७३	*प्रमादाद्द्विर्वल्याच्च,	श लि.,	८२९
प्रदत्ताऽन्यस्य तुष्टेन,	बृह.,	४५१	प्रमादाद्धनिनस्तद्वत्,	नार.,	२९२
प्रदद्याज्जयिने लेख्यं,	बृह.,	११९	प्रमादाद्धनिनो यत्र,	नार.,	१९३
प्रदातव्यं यद्धवति,	बृह.,	३३१	प्रमादाज्ञाशितं दाप्यः,	नार.,	३६०
प्रदानं स्वेच्छया कुर्यात्,	,,	६५३	,,	बृह-मनु.,	४०५
प्रदाने विक्रये चैव,	,,	३०१	प्रमादाज्ञोच्यते यत्तु,	नार.,	१६
प्रदाप्यः स्वामिने सर्वं,	व्यास.,	५२७	प्रमापणे प्राणभृतां,	कात्या.,	५०३
प्रदाप्याफूते शास्या,	बृह.,	५१०	प्रमापयेत्प्राणभृताः,	मनु.,	५०२
प्रदुष्टेषु समानेषु,	बृह.,	९६	प्रमीतसाक्षि ऋणकं,	बृह.,	३००
प्रपद्य कारण ब्रूयात्,	कात्या.,	६९	प्रयत्नसाध्ये विच्छिन्ने,	कात्या.,	४०
,,	बृह.,	६९	प्रयुक्तं सप्तभिर्वर्षैः,	बृह.,	२७९
प्रपलन्त्या वा रहसि,	,,	५७७	प्रयुक्तं साधयानोऽर्थं,	याज्ञ.,	३२९
प्रपलायी त्रिपक्षेण,	,,	८३	प्रयुक्तं साधयेदर्थं,	मनु.,	३२४
*प्रपितामहः पिता.,	बौधा.,	७५१	*प्रयुक्तमर्थं यथा कथञ्चित्,	विष्णु.,	३२९
प्रभाते कारिणो देया,	पिता.,	२५०	प्रयुक्ते शान्तलाभे तु,	बृह.,	१७४
प्रभुणा विनियुक्तः सन्,	बृह.,	४०५	प्रयोगं कुर्वते ये तु,	,,	३६८
प्रभुणा शासनीयास्ता,	कात्या.,	५९४	प्रयोगः कर्मयोगश्च,	मनु.,	३७६
प्रभेदमेषां वक्ष्यामि,	बृह.,	९९	प्रयोगः पूर्वमाख्यातः,	बृह.,	३६९
प्रमाणे तत्कृतं सर्वं,	,,	२७६	प्रयोगो यत्र चैवं स्यात्,	कात्या.,	२८५
प्रमाणे देशदृष्टं तु,	कात्या.,	२३	प्रयोजकेऽसति धनं,	याज्ञ.,	२९६
प्रमाणं लिखितं भुक्तिः,	याज्ञ.,	९२	प्रोज्यं न विभज्येत,	कात्या.,	६८०
प्रमाणं समिकस्तत्र,	कात्या.,	७६८	प्ररोहिशाखिनां शाखाः,	याज्ञ.,	५०३
प्रमाणं सर्व एवैते,	,,	२७५	प्रलोभनं चाज्ञपानैः,	व्यास.,	५७८
प्रमाणतरमिष्टं हि,	व्यास.,	१७१	प्रवर्तमानमन्याये,	मनु.,	५२२
प्रमाणनिश्चितां यत्तु,	बृह.,	२५९	प्रवासयेद्दण्डयित्वा,	मनु.,	१४२
प्रमाणमेकोऽपि भवेत्,	व्यास.,	१०३	प्रविशेत्प्रतिषिद्धस्तु,	मत्स्यपु.,	५८१
प्रमाणरहितां भूमिं,	बृह.,	४५१	प्रविष्टं सोदये द्रव्ये,	बृह.,	२९७
प्रमाणसमता यत्र,	बृह.,	८५	प्रवृत्तमपि तद्राज्ञा,	नार.,	४२६
प्रमाणसहिता यस्तु,	,,	२६०	प्रव्रज्यावसितं शूद्रम्,	कात्या.,	७९९
प्रमाणस्य हि ये दोषा,	कात्या.,	१२०	प्रव्रज्यावसितौ यत्र,	,,	३९०

प्रवज्यावसितश्चैव,  
 प्रवज्यावसिता ये तु,  
 प्रशिष्याद्भूपतिः सम्यग्,  
 प्रष्टव्याः सीमलिङ्गानि,  
 प्रष्टव्या योषितश्चास्य,  
 प्रष्टव्या राजपुरुषैः,  
 प्रसङ्गविनिवृत्त्यर्थं,  
 प्रसङ्ग धातिनश्चैव,  
 प्रसङ्गदापयेद्वेयं,  
 प्रसङ्ग दास्यागमने,  
 प्रसङ्ग वेश्यागमने,  
 प्रसङ्ग स विनेयः स्यात्,  
 " ,  
 प्रसङ्गातिहिनन्मोहात्,  
 प्रसादात्स्वामिनोऽन्यत्र,  
 प्रसाधनं नृत्यगीतं,  
 प्रसाधनोपचारज्ञं,  
 \*प्रसूतिरक्षणं,  
 प्रस्थानविघ्नकृच्चैव,  
 प्रहरन्ते कृतपणाः,  
 प्रहारेण तु गर्भस्य,  
 \*प्रहाराद्यमे षट्पचाशत्,  
 \*प्रहीणस्वामिकानि,  
 प्रहृष्टमानसा नित्यं,  
 प्राकारं भेदेद्यस्तु,  
 प्राक्तनस्य धनर्गस्य,  
 प्रागग्रान् कारयेद्भर्ता,  
 प्रागुक्तादुक्तशेषं च,  
 प्रागर्भमथवा शुल्कम्,  
 प्राग्निदिशि प्राङ्मुखो तस्य,  
 प्राग्दृष्टदोषशैलूषं,  
 प्राग्वृत्तवादी विजयं,  
 प्राङ्न्यायकारणं तथ्यं,  
 प्राङ्न्यायजयपत्रेण,  
 प्राङ्न्यायवादे तु तथा,  
 प्राङ्न्यायश्चोत्तराः प्रोक्ताः,  
 प्राङ्न्यास्तु स विज्ञेयो,

कात्या., ६६९  
 ,, ८१०  
 यम., ७७६  
 मनु., ४४२  
 याज्ञ., ५७५  
 बृह., ५७५  
 कात्या., ३५३  
 याज्ञ., ५३०  
 कात्या., ७६७  
 याज्ञ., ५९९  
 व्यास., ५९९  
 नार., ८२  
 बृह., ३३०  
 कात्या., १९१  
 नार., ३८८  
 बृह., ६३१  
 मनु-विष्णु., ८२१  
 गौत., ७७७  
 याज्ञ., ४०६  
 बृह., ७६१  
 उशना., ५७१  
 श.लि., ४८७  
 ,, ७५३  
 दक्ष., ६१४  
 कात्या., ५६७  
 ,, ४२८  
 पिता, २१७  
 कात्या., ७७४  
 ब्रह्मपु., ७२७  
 बृह., ४४  
 नार., १०९  
 बृह., ८७  
 बृह., ७०  
 नार., ८९  
 व्यास., ३३२  
 बृह., ६८  
 ,, ४५

प्राङ्न्याये कारणोक्तौ तु,  
 प्राङ्मुखं कारिणं कृत्वा,  
 प्राङ्मुखः प्राज्ञलिर्भूत्वा,  
 प्राङ्मुखस्तत्र तिष्ठच्च,  
 प्राङ्मुखो निश्चलः कार्यः,  
 प्राज्ञकश्च भवेदाप्तः,  
 प्राङ्गविवाकः सदस्यानां,  
 \*प्राङ्गविवाकमध्या भवेत्,  
 प्राङ्गविवाकस्तथा शल्यं,  
 प्राङ्गविवाकादिनामङ्गं,  
 प्राङ्गविवाकोऽथ दण्ड्यः,  
 प्राङ्गविवाकोऽनुयुञ्जीत,  
 प्राङ्गविवाकोऽपि तं पृच्छेत्,  
 प्राणभृत्सु महत्स्वर्धं,  
 प्राणात्यये तु यत्र स्यात्,  
 प्राणान्तिकविवादिषु,  
 प्राणिभिः क्रियते यस्तु,  
 प्राणोपरोधि यच्चान्यत्,  
 प्रातिभाव्यं दण्डशुल्कं,  
 प्रातिभाव्यं वृथादानं,  
 प्रातिभाव्यमृणं साक्ष्यं,  
 " ,  
 प्रातिभाव्यागतं पौत्रैः,  
 प्रातिलोम्यप्रसूतानां,  
 " ,  
 प्रातिलोम्यानुलोम्येन,  
 प्रातिलोम्येन तत्रैको,  
 प्रातिलोम्ये वधः पुंसो,  
 प्रातिवेश्यानुवेश्यौ च,  
 " ,  
 प्राप्तं वानेन चेत् किञ्चित्,  
 प्राप्तं शिल्पैस्तु यद्विज्ञं,  
 प्राप्तमात्रं येन भुक्तं,  
 प्राप्तकाले कृते कार्ये,  
 प्राप्तमेतैस्तु यत्किञ्चित्,  
 प्राप्ताः सर्वेषु वर्णेषु,  
 प्राप्तापराधास्ताभ्याः स्युः,

व्यास., ८७  
 पिता., २४६  
 ,, २१९  
 हारी., २२६  
 पिता., २१५  
 मनु., ५०२  
 बृह., ३९  
 गौत., ४७  
 नार-हारी., २५  
 बृहवसि., १५९  
 कात्या., ३९  
 मनु., १२४  
 बृह., ४७  
 मनु., ५०२  
 कात्या., ७९७  
 ,, ९६  
 मनु., ७६१  
 नार., ५५७  
 बृह., ३१६  
 मनु., ३१५  
 याज्ञ., ३०३  
 ,, ७५९  
 कात्या., ३०७  
 ,, ४९९  
 ,, ८००  
 यम., ८२३  
 नार., ८१६  
 याज्ञ., ५८६  
 बृह., ५७५  
 मनु., ५६२  
 कात्या., १७१  
 ,, ६९४  
 बृह., १७७  
 कात्या., ३४८  
 ,, ३८१  
 याज्ञ., १०५  
 मनु., ४९४

प्राप्तापराधास्ताड्यास्तु,  
प्राप्ते नृपतिभागे तु,  
प्राप्ते सप्तविधे भोगे,  
प्राप्नुयात्साहसं पूर्वं,

”

”

”

प्राप्नुयात् स्वर्गमेवेति,  
प्राप्नोति तस्य दातव्यो,  
प्रायश्चित्तं तु कुर्वाणाः,

प्रायश्चित्तविधानं तु,  
प्रायेण वा ऋगी दाप्यो,  
प्रायो दासीसुताः कुर्युः

प्रियपूर्वं प्राड्वदति,

प्रियपूर्वं वचः साम,

प्रिया भवन्ति लोकस्य,

प्रीतिदत्तं न वर्धेत,

प्रीत्या तु सकृदाजीवेत्,

प्रीत्या प्रदत्तं यत्किञ्चित्,

प्रीत्या विसृष्टमपि चेत्,

प्रेक्षासमाजे गच्छेद्वा,

प्रेतप्रजां पञ्चदशे,

\*प्रेतानां ज्येष्ठस्य,

प्रेतायां पुत्रिकायां न भर्ता,

प्रेते तस्मिन्नेवायति,

प्रेषणं गन्धमाल्यानां,

”

प्रेष्यान्वार्धुषिकांश्चैव,

”

प्रेष्यासु चैकभक्तासु,

प्रोक्तानि नारदेनेह,

प्रोषितस्य च यो भागो,

प्रोषितस्यामतेनापि,

प्रोषितस्वामिका नारी,

प्रोषिते त्वधियायैव,

\*प्रोषिते भर्तारि ब्राह्मणी,

यम., ४९४

याज्ञ., ७६६

बृह., १७७

कात्या., ३२७

” ३८४

” ४०८

” ५५९

मनु., ६३८

बृह., ७५५

मनु., ७८५

नार., ६००

बृह., ३२५

कात्या., ३८७

बृह., २५

बृह., ७४३

मनु., १९

कात्या., २८७

नार., ७६६

कात्या., ६९४

कात्या., ६८७

मनु., ६३०

बौधा., ६१७

गौत., ७४८

पैठीन., ६९१

नार., १८४

बृह., ५७८

व्यास., ५७८

कात्या., २०५

मनु., १३५

मनु., ५८३

नार., १९७

कात्या., ७५३

” ३१५

कात्या., ५९४

मनु., ६३१

श. लि., ६३२

फ

फलं त्वनभिसंधाय,

फलं पुष्पं च सामान्यं,

\*फलपुष्पोपगान् पादपान्,

फलभोगं पूर्णकालं,

फलमूलोदकादीनां,

\*फलहरितधान्यशाकादाने,

फलहेतोरुपायेन,

फलेषु हरिते धान्ये,

\*फलोपगद्गुमच्छेदी,

फालाहतमपि क्षेत्रं,

मनु., ७३८

कात्या., ४५६

वसि., ५०४

व्यास., २९८

नार., ५५६

गौत., ५३५

नार., ३५८

यम., ५३५

विष्णु., ५०४

याज्ञ., ४६०

ब

बन्धीयादम्भसो मार्गं,

बध्वा स्वगृहमानीय,

बन्धकस्य धनी स्वामी,

बन्धनानि च सर्वाणि,

बन्धहस्तस्य यद्द्वयं,

बन्धाग्निविषशस्त्रेण,

बन्धुदत्तं तथा शुल्कं,

बन्धुदत्तं तु बन्धूनां,

बन्धुमिश्रं स्त्रियः पूज्या,

बन्धुवर्गहतं द्रव्यं,

बन्धूनामप्यलभे तु,

बन्धूनामविभक्तानां,

\*बलविशेषेण,

बलात्कारयितव्योऽसौ,

बलात्संदूषयेद्यस्तु,

बलादत्तं बलाद्भूतं

बलाद्दासीकृतश्चौरैः,

बलाद्धि विवृणोत्येव,

बलाद्दासयितव्यः स्यात्,

बलोद्भूतेषु कार्येषु,

बलोपधिकृते द्वे तु,

\*बहवः स्युरनिन्दिताः,

बहवः स्युर्यदि स्वांशैः,

बहवश्चेत्त सदृशाः,

कात्या., ५६७

बृह., ३२५

व्यास., २९८

मनु., ७८२

बृह., २९५

” ५७२

याज्ञ., ६९१

कात्या., ६९०

याज्ञ., ६१७

कात्या., ६९६

” ६६९

” ६९६

आप., ७७८

कात्या., ४०३

मत्स्यपु., ५९४

मनु., २७१

याज्ञ., ३९२

रामायण., ७८

नार., ३८४

कात्या., ९४

बृह., ५७७

गौत., १०५

याज्ञ., ३०७

श. लि., ७१७

बहवो ज्ञातयो यत्र,	बृह.,	७५१	बाहुग्रीवानेत्रसक्थि,	याज्ञ.,	४७७
बहिर्ग्रामनिवासश्च,	यम.,	८३२	*बाहुभ्यां तरन्,	वसि.,	७९०
बहिर्वर्गेषु चारित्र्यात्,	देव.,	६६०	बाहु सभ्याः स्मृतिर्हस्तौ,	बृह.,	२६
बहिर्वासिषु बाह्याः स्यु,	नार.,	१०६	बाह्यकर्मकवीजाद्यैः,	बृह.,	३६९
बहिश्चैद्वाप्यते धर्मात्,	मनु.,-नार.,	२७०	बाह्यवीजात्ययाद्यस्य,	बृह.,	३७०
बहुत्वं परिगृहीयात्,	मनु.,	१४८	बाह्यमेवं समाख्यातं,	कात्या.,	२४१
बहुधार्थमृतः प्रोक्तः,	बृह.,	३८५	विभूयादानुशस्येन,	मनु.,	३९७
बहुप्रतिज्ञं यत्कार्यं,	कात्या.,	८९	विभूयाद्वेच्छतः सर्वान्,	नार.,	६५०
बहुभिर्भुक्तपूर्वा या,	व्यास.,	५९८	बीजमेके प्रशंसति,	मनु.,	८२४
बहुमिश्र कुलीनैर्वा,	कात्या.,	१४९	*बीजक्षेत्रयोरनु,	श. लि.,	७२२
बहुमूल्यं यत्र नष्टं,	बृह.,	२९४	बीजक्षेत्रे तथैवान्ये,	मनु.,	८२४
बहुनां व्रजतामेकां,	मत्स्यपु.,	४१०	बीजयोनिविशिष्टास्ते,	यम.,	८१८
बहुनां तु गृहीतानां,	कात्या.,	४४६	बीजस्य चैव योन्याश्च,	मनु.,	७३७
बहुनां यद्यकामासौ,	याज्ञ.,	५९९	ब्रह्मघ्ना ये स्मृता लोका,	विष्णु.,	२२०
बहुनां संमतो यस्तु,	बृह.,	३६८	ब्रह्मघ्नो ये स्मृता लोका,	मनु.,	१३१
बहुयः समांशतो देया,	बृह.,	६८७	ब्रह्मघ्नो वा कृ-घ्नो वा,	अत्रि.,	६३३
बह्वीनामेकपत्नीनां,	बृह.,	७४१	*ब्रह्मचारिवानप्रस्थ,	विष्णु.,	७९०
बह्वीषु चैकजातानां,	मनु.,	६९६	ब्रह्मतेजोमयं दण्डं,	मनु.,	७९४
बाधकं च यदर्थानां,	नार.,	४२६	ब्रह्मदायागतां भूमिं,	बृहमनु.,	७०२
बाधां कुर्युर्देवस्य,	बृह.,	४२५	ब्रह्मस्वं पुत्रपौत्रघ्नं,	बाधा.,	७५२
बाधाकाले तु सा कार्या,	बृह.,	४२०	ब्रह्महत्यासुरापाने,	कात्या.,	७५
बाल-अ-षोडशवर्षात्,	नार.,	२७४	ब्रह्महा च सुरापश्च,	मनु.,	७८४
बालदायागतं रिक्तं,	मनु.,	७५२	ब्राह्मदैवार्षगान्धर्वं,	मनु.,	६९०
बालधात्रीमदासीं च,	कात्या.,	३९९	ब्राह्मणः क्षत्रियो वैश्यः,	मनु.,	८११
बालपुत्राधिकार्था च,	,,	३२३	ब्राह्मणः क्षत्रियो वैश्यो,	नार.,	२३६
बालपुत्रे मृते रिक्तं,	कात्या.,	७५३	ब्राह्मणः प्रातिवेश्याश्च,	याज्ञ.,	५६२
बालमूढास्वतन्त्रश्च,	नार.,	३७०	*ब्राह्मण आपदुद्धरति,	वसि.,	७८४
बाल्या वा युवत्या वा,	मनु.,	६१९	*ब्राह्मण एव सः,	उशना.,	८१४
बालवृद्धातुरस्त्रीणां,	कात्या.,	८०२	*ब्राह्मण एव स इति,	उशना.,	८१४
बालवृद्धातुराणां च	मनु.,	११९	ब्राह्मणक्षत्रियविशां,	मनु.,	७०४
बालवृद्धातुराणां तु,	,,	४७	ब्राह्मणक्षत्रियाभ्यां तु,	मनु.,	४८३
बालवृद्धातुरान् स्त्रीश्च,	नार.,	२०५	*ब्राह्मणवर्जं षड्धा,	विष्णु.,	६९९
बालोन्नियमिते च,	कात्या.,	१९०	*ब्राह्मणश्चैव रात्रौ च,	वसि.,	७९१
बालनाथस्त्रीधनानि,	विष्णु.,	७३३	ब्राह्मणस्तु परीक्षीणः,	नार.,	४८३
बालाश्च न प्रसीयन्ते,	मनु.,	७८७	*ब्राह्मणस्तु सवर्णायाः,	याज्ञ.,	३२७
बालोऽज्ञानाऽसत्यात्,	नार.,	११८	ब्राह्मणस्त्वब्राह्मणवचनात्,	श. लि.,	७२०
बा.ये पि.वंशे तिष्ठत्,	मनु.,	६१९		गौत.,	१४४



ब्राह्मणस्य चतुःषष्टिः,	मनु.,	५५१
*ब्राह्मणस्य चतुर्षु,	विष्णु.,	६९९
ब्राह्मणस्य तु यद्वैयं,	नार.,	३३७
ब्राह्मणस्य धनो देयः,	नार.,	३३७
ब्राह्मणस्य परीदारो,	नार.,	८०३
ब्राह्मणस्य भ्रूणहत्या,	बौधा.,	७८५
*ब्राह्मणस्य राजन्या,	गौत.,	७८१
ब्राह्मणस्यानु पूर्वेण,	मनु.,	६९६
ब्राह्मणस्यापराधेषु,	नार.,	७८५
ब्राह्मणाश्च तथा चान्यान्,	यम.,	७८६
ब्राह्मणातिक्रमे त्रया,	व्यास.,	१५७
*ब्राह्मणात्क्षत्रियायां,	बृह.,	४९९
ब्राह्मणात्क्षत्रियायां तु,	उश.,	८१४
ब्राह्मणादुपक्रन्यायाम्,	देव.,	८१२
ब्राह्मणाद्वैश्यकन्यायाम्,	मनु, विष्णु.,	८२०
ब्राह्मणानां श्रुतवतां,	मनु.,	८१३
ब्राह्मणानां समूहस्तु,	पिता.,	२१२
ब्राह्मणान् बाधमानं तु	कात्या.,	८१०
ब्राह्मणभ्युपपत्तौ च,	मनु.,	७९९
ब्राह्मणार्थे गृहार्थे वा,	मनु.,	२५७
ब्राह्मणा लिङ्गिनश्चैव,	मनु.,	८३३
ब्राह्मणी यद्यगुप्तां तु,	मनु.,	७८९
ब्राह्मणी तद्वरेत्कन्या,	मनु.,	६७१
*ब्राह्मणीसुत चतुरोऽंशान्,	मनु.,	६८९
*ब्राह्मणेन कृष्णायां,	विष्णु.,	६९९
*ब्राह्मणेन शूद्रायां,	पैठी.,	८१९
*ब्राह्मणेभ्योऽंशद्वयमेव,	श. लि.,	८१४
ब्राह्मणे साहसः पूर्वः,	विष्णु.,	७९३
*ब्राह्मणो धर्मान्,	मनु.,	४८२
ब्राह्मणोऽपि निधिं लब्ध्वा,	वसि.,	७७७
*ब्राह्मणो वेदमाद्यं,	नार.,	७९२
*ब्राह्मण्यजीजनत्,	वसि.,	७१४
ब्राह्मण्यां ब्राह्मणाज्जातः,	गौत.,	८१५
ब्राह्मण्यां क्षत्रियाज्जातः,	देव.,	८१२
ब्राह्मण्यां ब्राह्मणाज्जातः,	देव.,	८१७
ब्राह्मण्याः शिरसि वपनं	देव.,	८१२
	वसि.,	५९२

ब्राह्मण्यामपि चण्डालः,	नार.,	८१५
ब्राह्मण्यामप्यनार्यात्तु,	मनु.,	८२३
ब्राह्मण्येकान्तरं सूते,	नार.,	८१६
ब्रुवाणस्त्वन्यथा सभ्यः,	नार.,	३६
ब्रूयास्त्वयं वा सदसि,	नार.,	५०४
ब्रूयान्मिथ्येति तथ्यं वा,	कात्या.,	११४
ब्रूहीति ब्राह्मणं पृच्छेत्,	मनु.,	१३१
ब्रूहीत्युक्तश्च न ब्रूयात्,	मनु.,	८०

## भ

भक्तदासश्च विज्ञेयः,	नार.,	३८८
भक्तस्यार्थे कृतं यत्स्यात्,	कात्या.,	३१७
भक्तस्वोपेक्षणात्सद्यो,	नार.,	३९१
भक्ताच्छादं प्रदायैषां,	बृह.,	२१
भक्ताच्छादभृतः सीरात्,	बृह.,	४०२
भक्तावकाशदातारः,	नार.,	५४८
भक्तावकाशान्युदक,	याज्ञ.,	५४८
भक्तो यो यस्य देवस्य,	पिता.,	२४५
भक्षयित्वोपविष्टानां,	याज्ञ.,	४६५
भक्षितं चापि यद्गुणं,	नार.,	३९१
भक्षितं सोदयं दाप्यः,	व्यास.,	३४४
भक्षिते तु यदा स्वस्थो,	नार.,	२४३
भक्ष्यभोज्यान्नपानानि,	नार.,	७६६
भगिनीमातृसंबन्धं,	बृह.,	४७३
*भगिनीशुल्कं सोद,	गौत.,	६९१
भगिन्यश्च निजादंशात्,	याज्ञ.,	६७१
भगिन्यो बान्धवैः सार्धं,	कात्या.,	६९०
भग्नं च धारितं चैव,	नार.,	२४०
भग्नोन्मृष्टाक्षरकृतं,	बृह.,	१६४
भग्नोन्मृष्टाक्षरकृतं,	नार.,	५५६
भृङ्गे च शृङ्गवेराभं,	कात्या.,	२४१
भजेरन् पैतृकं रिक्तं,	मनु.,	६४६
भजेरन् भ्रातृभिः सार्धं,	कात्या.,	६९५
भजेरन् मातृकं रिक्तं,	मनु.,	६८८
भयत्राणाय रक्षार्थं,	कात्या.,	३७८
भयदोषोद्धवा मिथ्या,	बृह.,	७०
भयवर्जितभूपेन,	कात्या.,	४८९
भयाद्द्वौ मध्यमौ दण्ड्यौ,	मनु.,	१४१

भयार्तः पेतयेद्यस्तु,	पिता.	२३२	भाण्डावकाशदाश्वव,	मनु.,	५४८
भरणं चास्य कुर्वीरन्,	शङ्ख.,	७४९, ७५६	भारवाहोऽधमः प्रोक्तः,	बृह.,	३८६
*भर्तुरि प्रोषिते,	विष्णु.	६३२	भार्या रक्षत कौमारी,	पैठी.,	६०३
भर्तारं लङ्घयेद्या तु.,	मनु.,	५९३	*भार्या पुत्रवती धर्म्या,	वादिभ.,	२४८
भर्तुः पित्रोः सकाशाद्वा,	कात्या.,	६९४	भार्या पुत्रश्च दासश्च,	मनु.,	४९३
भर्तुः प्रतिनिवेशेन,	यम.,	६९७	भार्या पुत्रश्च दासश्च,	यम.,	४९४
भर्तुः प्रीतिकरी या तु,	दक्ष.,	६९४	भार्यासुतविहीनस्य,	बृह.,	७४७
भर्तुः शरीरशुश्रूषां,	मनु.,	६९९	भावयेत्साक्षिभिः कार्यं,	कात्या.,	९९६
भर्तुः समानचारित्वम्,	विष्णु.,	६२०	भावाधानकयाधान,	बृह.,	९५२
भर्तुः स्वाम्यं सदा तत्र,	कात्या.,	६९४	भावितं चेत्प्रमाणेन,	कात्या.,	६७३
भर्तुरादेशवर्तिन्या,	कात्या.,	६९३	भाविताः साक्षिणो वज्याः,	व्यास.,	९२२
भर्तुश्च वधमिच्छन्ती,	नार.,	६९६	भाषाया उत्तरं यावत्,	नार.,	६२
भर्तुकामेन या भर्त्रा,	कात्या.,	३९८	भास्करस्य च यत्तोयं,	पितात्र.,	२४५
भर्तुगोत्रं समुत्सृज्य,	कात्या.,	६४६	भिक्षुका बन्दिनश्चैव,	मनु.,	५८९
भर्तृदायं मृते पत्यौ,	कात्या.,	६८५	भिक्षुकोप्यथवा नारी,	मत्स्यपु.,	५८९
भर्तृद्रोहे यथा नार्याः,	बृह.,	३४०	भिद्यते मुखवर्णोऽस्य,	नार.,	९४०
भर्तृभ्रातृपितृज्ञाति,	याज्ञ.,	६९०	भिन्नकाले तु यत्कार्यं,	कात्या.,	९३७
भर्तृलोकं न त्यजति,	मनु.,	६२९	भिन्नगोत्राः पृथक्पिण्डाः,	ब्रह्मपु.,	७३६
भर्त्रा पित्रा सुतेन स्त्री,	बृह.,	६९९	भिन्नवृत्तासमावृत्त,	नारद.,	९९४
भर्त्रा पुत्रेण सार्धं,	कात्या.,	३९८	भिन्ने दग्धे तथा छिन्ने,	याज्ञ.,	९६२
भर्त्रा प्रतिश्रुतं देयं,	कात्या.,	६८८	मिन्ने पणे तु पञ्चाशत्,	याज्ञ.,	५२३
भर्त्रा प्रीतेन यद्दत्तं,	नार.,	६८४	मिषड्मिथ्याचरन् दाप्यः,	याज्ञ.,	५२०
भवन्त्यायोगवीष्वेते,	मनु., विष्णु.,	८२२	मुक्तिः सा पौरुषी भूमेः,	व्यास.,	९८९
भवेत्कूटं न चेत्कर्ता,	कात्या.,	९६४	मुक्तिरेव तु गुर्वी स्यात्,	कात्या.,	९४
भवेत्समांशो विप्रेण,	,,	७०९	मुक्तिर्बलवती शास्त्रे,	कात्या.,	९७९
भस्मपङ्कजरजः स्पर्शं,	याज्ञ.,	४८६	मुक्तिस्त्रिपौरुषी सिध्येत्,	बृह.,	९८९
भस्मादिमिश्रोपघातो,	नार.,	४८५	मुक्ते चासारतां प्राप्ते,	बृह.,	२९४
भस्मादीनां प्रक्षेपणं,	बृह.,	४८५	मुज्यमानं परैस्तूष्णीं,	मनु. नार.,	९८७
भस्मादीनां प्रक्षेपणं,	व्यास.	४८५	मुज्यमानान् परैरर्थान्,	नार.,	९८५
भागं विद्याधनस्तस्मान्न,	नार.,	६८२	भूर्जस्यैव तु नान्यस्य,	पिता.	२५०
भागशुल्कोचिततमे,	बृह.	२२	भूतं तत्त्वार्थसंयुक्तं,	नार.,	४२
भागो यवीयसां तत्र,	मनु.,	६८२	भूतच्छलानुसारित्वात्,	नार.,	४२
भाटं न दद्याद्वाप्यः स्यात्,	बृह-मनु.,	४१२	भूतमप्यनुपन्यस्तं,	याज्ञ.,	९७
भाटं न दद्याद्वाप्या स्यात्,	मत्स्यपु.,	४०९	भूतमेव प्रपद्येत,	नार.,	९६
भाण्डं व्यसनमागच्छेत्,	नार.,	४०५	भूनाविष्टनृपद्विष्ट,	नार.,	९९०
भाण्डपिण्डव्ययोद्धार,	नार.,	३५९, ३६९	भूतकामैर्नैरनित्यं,	मनु.,	६९०
भाण्डपूर्णानि यानानि,	मनु.,	७८९	भूमिं दत्त्वा तु यः पत्रं,	बृह.,	९५४

भूमिजानि तु सर्वाणि,  
भूमेरभुक्तिर्लैख्यस्य,  
भूमौ च पादपे क्षिप्रं,  
भूमौ निवेशयेतावत्,  
भूयाद्भोगाय कल्पन्ते,  
भूयादायविभागः स्यात्,  
भूधायति सत्येन,  
भूयां पितामहोपात्ता,  
भूलेखनं स्थानहानि,  
\*भृतकश्चापूर्णे काले,  
भृतकस्तु न कुर्वीत्,  
भृतकस्त्रिविधो ज्ञेयः,  
भृतानां वेतनस्योक्तिः,  
भृताय वेतनं दद्यात्,  
भृतावनिश्चितायां तु,  
भृतिं गृहीत्वाकुर्वाणो,  
भृतिमर्धपथे सर्वा,  
भृतिषड्भागमादाय,  
भृतिस्तुष्ट्या पण्यमूल्यं,  
भृतिहानिमवाप्नोति,  
भृतोऽनार्तो न कुर्याद्यो,  
भृतौ धारयसे तस्मात्,  
भृत्या भवन्ति प्रायेण,  
भृत्यास्तदनु कुर्वन्ति,  
भृत्येभ्योऽन्नं स्मरन्धर्मं,  
भृशं न ताडयेदेनं,  
भेदं चैषां नृपो रक्षेत्,  
भेदयेन्नैव चान्येन,  
भेदाद्विप्रतिपत्तिः स्यात्,  
भेदेनोपेक्षया न्यासं,  
भेषजस्नेहलवणं,  
भैक्ष्यहेतोः परागारे,  
भोक्ता कर्मफलं दाप्यो,  
भोक्त्री च स्वयमेवेदं,  
भोगच्छेदनिमित्तं च,  
भोगन्नाभस्तथा तद्वत्,  
भोगात्तत्र न सिद्धिः स्यात्,

पिताम. २४०  
बृह., १८८  
बृह. कात्या., ६७  
कात्या., ६३  
मनु., ७९४  
देव., ६६३  
नार., १२७  
याज्ञ., ६५२  
कात्या., ७८  
विष्णु., ४०५  
बृह., ४०३  
बृह., ३८६  
नार., ४००  
नार., ४००  
नार., ४००  
नार., ४०३  
याज्ञ., ४०६  
नार., ४०७  
बृह., ३७७  
बृह., ४०३  
मनु., ४०४  
पिता., २२०  
मनु., ५३८  
यम., ७७६  
यम., ७८७  
नार., ४९४  
याज्ञ., ४२१  
नार-कात्या., ८१  
नार., १०८  
बृह., ३४४  
याज्ञ., ५१४  
नार., ८०३  
कात्या., २९४  
देवल., ६८५  
बृह., १९२  
बृह., ३२८  
कात्या., १८९

भोगो यद्दिगुणादूर्ध्वं,  
भोज्यान्नश्च प्रतिप्राहो,  
भ्रष्टवंशास्तु पतिता,  
भ्रातरः संविभक्ता ये,  
भ्रातरो ये च संसृष्टाः  
भ्राता वा भ्रातृपुत्रो वा, बृद्धशाता., बृह., ७५४  
भ्राता शक्तः कनिष्ठो वा, नार., ६५०  
भ्राता सखा च जामाता,  
भ्रातुः सकाशात्पित्रोर्धत्,  
भ्रातुः सकाशात्पित्रोर्वा,  
भ्रातृदत्तं पितृभ्यां च,  
भ्रातृमिस्तद्विभक्तव्यं,  
भ्रातृमातृपितृप्राप्तं,  
भ्रातृसंतानमिच्छद्भिः,  
भ्रातृणां यस्तु नेहेत,  
भ्रातृणामथ दम्पत्योः,  
भ्रातृणामव्रजाः प्रेयात्,  
भ्रातृणामविभक्तानां,  
,,  
भ्रातृणामेकजातानां,  
भ्रात्रा पितृव्यमातृभ्यां,  
भ्रातिः शङ्का समुद्दिष्टा,  
भ्रूणहा वित्तहा चैषां,

बृह., २८६  
नार., ३९३  
यम., ८२३  
बृह., १५४  
मनु., ७५५  
बृह., ७५४  
नार., ६५०  
बृह., ११२  
कात्या., ६७५  
कात्या., ६८४  
नार., ६९३  
नार., ६७२  
मनु., ६९३  
यम., ६४१  
मनु., ६६५  
याज्ञ., ३०३, ७५९  
शङ्ख., ७५६  
मनु., ६५५  
नार., ७५८  
मनु., ७४०  
कात्या., ६७२  
बृह., ६०  
बृह., १२६

म

मङ्गलादेशवृत्ताश्च,  
मणिमन्त्रौषधिवलात्,  
मणिमुक्तानाणकानां,  
मणिमुक्ताप्रवालानां,  
मणीनामवबाधेषु,  
मण्डपे पुष्पधूपैश्च,  
मण्डलं तु पुष्पधूपाभ्यां,  
मण्डलं रक्तसंकाशं,  
मण्डलस्य प्रमाणं तु,  
मण्डलानि तथा सप्त,  
मण्डले मण्डले देगाः,  
मर्तं येऽमुकपुत्रस्य,

मनु., ५०८  
व्यास., १०६  
बृह., ९५  
कात्या., २८८  
मनु., ५६४  
पिता., २३४  
पिता., २३४  
नार., २३२  
नार., २२५  
कालि-पु., २३१  
पिता., २२६  
याज्ञ., १५५

मतिर्नोत्सहते यत्र,	काला.,	६२	मनुष्याणां पशूनां च,	मनु.,	४८९
मत्तातिवृद्धनिर्धूतैः,	बृह.,	३७९	मनुष्याणामपि प्रोक्तो,	मनु.,	६४२
मत्ताभियुक्तस्त्रीबाल,	नार.,	१६३	मन्त्रज्ञैर्मन्त्रिभिः सार्धं,	मनु.,	१७७
मजोद्युक्तोऽतिवृद्धश्च,	बृह.,	५४	मन्त्रयोगविदां चैव,	कात्या.,	२०६
मत्तोन्मत्तप्रमत्तार्त,	कात्या.,	५५	*मन्त्रसंस्कारकर्तुः,	श. लि.,	७२२
	नार.,	१०९	*मन्त्रिभिः दुष्टलक्षणं ग्राह्यं,	,,	१३४
सत्तोन्मत्तार्तार्थधीनैः,	मनु.,	२७१	मन्त्रेणानेन सहितं,	पिता.,	२२९६
मत्तोन्मत्तेन विक्रीतं,	बृह.,	४३२	मन्त्रौषधिलाल्किचित्,	बृह.,	५३७
मत्स्याघातो निषादानां,	मनु.,	८२९	मन्दं पञ्चशतं ज्ञेनं,	नार.,	२२४
मत्स्यादाश्च नराः पूर्वे,	बृह.,	२१	मन्यन्ते वै पापकृतो,	मनु.,	१२५
मत्स्यानां पक्षिणां चैव,	मनु.,	५३५	ममानेन प्रदातव्यं,	बृह.,	४९
मद्यपस्त्री व्यसनानां,	पिता.,	२०७	ममायमिति यो ब्रूयात्,	मनु.,	७६५
मधुक्षीरसमायुक्तं,	कात्या.,	२४१	ममेदमिति यो ब्रूयात्,	,,	५५५
मध्यदेशे कर्मकराः,	बृह.,	२१	मर्दितो यदि नो दग्धः,	नार.,	२३३
मध्यमे मध्यमपशून्,	नार.,	५३१	मर्मघाती तु यस्तेषां,	बृह-कात्या.,	५७३
मध्यमे शस्त्रमादाय,	पिता-नार.,	२३८	मर्मप्रहारदो यस्य,	,,	५७३
मध्यमे साहसं गोषु,	नार.,	५९९	मर्यादामेदकश्चैव,	मनु.,	५१३
मध्यमः पञ्च विज्ञेयः,	मनु.,	८०७	मर्यादाचिहितं क्षेत्रं,	कात्या.,	३०३
मध्यमः शस्त्रधाने,	बृह.,	४८८	मर्यादातिक्रमं सद्यो,	नार.,	४९८
मध्यमस्तु शरो ग्राह्यः,	पिता.,	२३५	मर्यादायाः प्रभेदे तु,	याज्ञ.,	४५६
मध्यमस्य तु शास्त्रज्ञैः,	नार.,	५५८	मर्यादायाममर्यादाः,	महाभा.,	६०७
मध्यमेन तु चापेन,	पिता.,	२३५	मर्यादाया विलोपेन,	यम.,	८२३
मध्यमो जातिपूगानां,	याज्ञ.,	४८३	मर्यादा लेखिता धार्या,	बृह.,	२२
मध्यमस्थापितं तस्यात्,	याज्ञ.,	२११	मत्ता ह्येते मनुष्याणां,	नार.,	४९८
मध्यस्था वज्रयन्त्येकं,	बृह.,	५२६	मलिनाङ्गीमर्धःशय्यां,	बृह.,	५९४
मध्यस्थितमनाजीव्यं,	बृह.,	६८०	मर्त्यदमेदितं दग्धं,	कात्या.,	१६२
मध्यहीनद्रव्यहारी,	व्यास.,	५३५	महता तु प्रयत्नेन,	,,	४८४
मध्ये तु रोधनं दण्डं,	बृह.,	७८१	महर्षयस्तथेन्द्राद्याः,	नार.,	२५५
मध्ये दण्डो व्रणान्नेदे,	याज्ञ.,	४८९	महर्षिभिश्च देवैश्च,	मनु.,	२५५
मध्ये पञ्चपला सैत्रि,	याज्ञ.,	५२५	महागुणोऽल्पबाधश्चेत्,	नार.,	४५७
मघ्नास्वादो विषं पश्चात्,	बृह.,	३७५	महानद्याऽथवा राज्ञा,	व्यस.,	४५०
मनुष्यचित्तवैचित्र्यात्,	नार.,	१६	महान् दोषो भवेत्कालात्,	कात्या.,	१२३
मनुष्यपशुमांसस्थि,	नार.,	११०	महापक्ष धनन्यार्थे,	मनु.,	३९०
मनुष्यमारणं चौर्यं,	नार.,	५५६	महापथिकसामुद्रं,	नार.,	१०९
मनुष्यमारणे क्षिप्रं,	मनु.,	५०२	महापराधयुक्तांश्च,	बृह.,	७८०
मनुष्यमारणे स्तंभे,	कात्या.,	७५	महापराधे निर्धर्मे,	नार.,	२०७
मनुष्यहारिणो राज्ञा,	बृह.,	५२७	महापशून्तेनयतो,	,,	५३१

महापशूनां हरणे,	मनु., ५३०	मातुः सपत्नीं भगिनीं,	याज्ञ., ५८७
महापशूनामेतेषु,	याज्ञ., ४९९	*मातुरलंकारं दुहितरः,	बौधा., ६७१
महापातक्युक्तानां,	कात्या., २०८	*मातुरशितपीतादि,	श. लि., ६३०
महापातकयुक्तेषु,	,, ,,	मातुर्दुहितरशेषं,	याज्ञ., ६८९
महापातकयुक्तोऽपि,	बृह., ७८४	मातुर्दुहितरोऽभावे,	नार., ६४९
महापातकयोक्त्री च,	कात्या., ४७२	मातुर्निवृत्ते रजसि,	नार., ६५३
महापातकशस्तेषु,	कालि. पु., २१०	मातुलस्य सुताश्चैव,	कात्या., ११३
महापापोमिशस्तो यः,	बृह., ८३	मातुस्तु यौतकं यत्स्यात्,	मनु., ६८९
महापापामिशापेषु,	बृह., ९६	मातृकं पैतृकं चैव,	अङ्गिरा., ६३३
महापापोपपापाभ्यां,	बृह., ८३	मातृजात्यां प्रसूयन्ते,	मनु-विष्णु., ८२१
महामिथोगेष्वेतानि,	याज्ञ., २०९	*मातृयुक्ते तूतम,	विष्णु., ४७९
महिषी चेत्सस्यनाशं,	विष्णु., ४६६	मातृष्वसा मातुलानी,	बृह., ६९९
महिषोष्ट्रगवां द्वौ द्वौ,	याज्ञ., ५५४	मातृष्वसुताश्चैव,	कात्या., ११३
महोक्षोत्सृष्टपशवः,	याज्ञ., ४६८	मात्रा च स्वधनं दत्तं,	नार., ६७६
मासं त्रिंशत्समातीते,	कात्या., ६५	मात्रा वाथ कुटुम्बार्थे,	नार., ३१२
मांसमेता तु षणिष्कान्.,	मनु., ४८८	मानवाः सथ एवाहुः,	कात्या., ५४१
मांसमद्यामियोगं चः,	बृह., ६३१	मानुषीस्तत्र गृहीयात्,	कात्या., ९२
मांसस्य मधुनश्चैव,	मनु., ५३५	मानुषे मध्यमं राज,	याज्ञ., ५२०
मागधः क्षत्रजातिश्च,	मनु-विष्णु., ८२१	मानेन तुलया वापि,	,, ५१२
*मागधानां शृद्धि,	श. लि., ८३०	मायायोगविदां चैव,	बृह-कात्या., ३२
मागधायोगबौ तद्वत्,	नार., ८१६	मायाविनो धृतधनाः,	बृह., ६९६
मातरं पितरं जायां,	मनु., ४७७	*मार्गक्षेत्रे पथि विसर्गो,	श. लि., ४५४
मातर्यपि च वृत्तायां,	मनु., ७४८	*मार्गक्षेत्रे वृत्तिः कार्या,	श. लि., ४६३
*मातर्यप्येवं स्थितायां,	श. लि., ६५१	मार्गे पुनरवस्थाप्यो,	नार., ५६६
माता ऋक्थदरी ज्ञेया,	बृह., ७४७	मात्यधूपासनोपेतां,	बृह., ४४
माता पिता वा दद्यातां,	मनु., ७३१	मात्रमंस्थाः स्वमात्मानं,	मनु., १२५
मातापितृद्विजगुरु,	कात्या., २०८	माषः पादो द्विपादो वा,	कात्या., ८०९
मातापितृविहीनो यः,	मनु., ७३३	माषकस्तु भवेद्दण्डः,	मनु., ५०३
मातापित्रोरात्मनश्च,	व्यास., १५७	माषानिष्टौ तु महिषी,	याज्ञ., ४६५
मातापित्रोगुरौ मित्रे,	दक्ष., ३७८	माषावराधो यः प्रोक्तः,	नार., ७९८
*मातापित्रोर्हस्तात्,	बौधा., ७३३	माषो विंशतिभागस्तु,	स्मृतिः, २७९
मातामहाय दद्यात्स,	नार., ७२९	माषो विंशतिभागस्तु,	नार., ८०९
मातामद्या धनार्त्तिकचित्,	मनु., ६८८	मासं ऋतुत्रयं वर्षं,	बृह., ६४
मातामातृष्वषा श्वश्रू,	नार., ५८७	मासषाण्मासिकश्राद्धे,	,, ७५१
*मातुः पारिणाह्यं स्त्रियो,	वसि., ६८९	मासस्य वृद्धिं गृहीयात्,	मनु., २८०
मातुः पिता पितृव्यश्च,	बृह., ११२	मासार्धमासं कुर्वीत,	यमः, ७७३
मातुः प्रथमतः पिण्डं,	मनु., ७२८	मासे वर्षे ऋणी नाम,	याज्ञ., १५५

*मा स्म संकरो भवतु,	पैठी.,	६०३	मुद्रिताध्यक्षसंयुक्ता,	बृह.,	२६
माहिष्येण करण्यां तु,	,,	८२३	मुमूर्षुधनलब्धार्थं,	बृह.,	१६३
माहिष्योग्रौ प्रजायेते,	याज्ञ.,	८१३	मुमूर्षुशिशुभीतातैः,	,,	,,
मित्रद्रुहः कृतघ्नस्य,	मनु.,	१३१	मुषितं घातितं यत्र,	,,	१०१
मित्रप्राप्त्यर्थलोभैर्वा,	बृह.,	५७१	मुषितः शपथान् दाप्यो,	बृद्धमनु.,	५५४
मित्रादिषु प्रयुज्जीत,	कात्या.,	७८१	मूत्रेण मौण्ड्यमिच्छेत्तु,	मनु.,	५९१
मित्रः संघातकरणं,	नार.,	४२६	मूर्खैर्लुब्धैर्न देयानि,	कात्या.,	२१३
मित्र एव प्रदातव्यो,	मनु.,	३४१	मूर्खैर्लुब्धैश्च दुष्टैश्च,	कात्या.,	२१३
मित्रो दायः कृतो येन,	मनु.,	,,	मूलं च सोदयं पश्चात्,	बृह.,	२८६
मिथ्याकारणयोर्वीपि,	व्यास.,	७०	मूलं वा साक्षिणो वाथ,	कात्या.,	६५
मिथ्या चैवैकदेशे च,	कात्या.,	७१	मूलकर्म च कुर्वन्ति,	बृह.,	५२७
मिथ्या तत्तु विजानीयात्,	बृह.,	६८	मूलकर्माणि चानाप्तैः,	मनु.,	५६५
*मिथ्यादूषिणां मेलकानां,	हारी.,	४८४	मूलक्रिया तु तत्र स्यात्,	कात्या.,	१९५
मिथ्यामियोगिनो ये स्युः,	नार.,	२६४	मूलमेव स दाप्यः स्यात्,	,,	६८६
मिथ्यामियोगी द्विगुणं,	व्यास.,	३३२	मूलानयनकालश्च,	,,	३५१
मिथ्यामियोगे दण्ड्याः स्यात्,	कात्या.,	१२०	मूले दत्ते तथैवैषा,	बृह.,	२८५
मिथ्यामियोगे द्विगुणे,	,,	२६३	मूलेन सह वादस्तु,	व्यास.,	३५१
मिथ्यावदन् परीमाणं,	याज्ञ.,	५१४	मूले समाहृते क्रेता,	,,	३५१
मिथ्यावाची च संस्थाने,	मनु.,	५१४	मूलोदयं प्रविष्टं चेत्,	बृह.,	२९७
मिथ्या संप्रतिप्रतिश्च,	बृह.,	६८	मूल्यं तु द्विगुणं दाप्यो,	नार.,	४३२
मिथ्येतन्नाभिजानामि,	व्यास.,	६८	मूल्यं लब्धं तु यत्किञ्चित्,	कात्या.,	६९५
मिथ्योक्तौ तु चतुष्पादः,	बृह.,	४५	मूल्यमादाय यो विद्यां,	मत्स्यपु.,	४०६
मिथ्योक्तौ पूर्ववादी तु,	व्यास.,	८७	मूल्यात्पञ्चगुणो दण्डः,	मनु.,	५५९
मिथ्योत्तरं कारणं वा,	,,	७०	मूल्याष्टभागो हीयेत,	नार.,	५२६
मुक्तभाव्याश्च नृपतिः,	बृह.,	४१९	मूल्येन तोषयेच्चैनं,	मनु.,	२९३
मुक्तावज्रप्रवालानां,	नार.,	४३६	मृग्यो दाप्योऽन्यथा मोषं,	नार.,	५५२
मुक्तो विरोधकरणैः,	कात्या-बृह.,	६१	मृचर्ममणिसूत्रायः,	याज्ञ.,	५२२
मुखसंदर्शनेनापि,	बृह.,	७४१	मृण्मयौ सूत्रसंबद्धौ,	पिता.,	२१५
मुखान्मुखं परिहरन्,	नार.,	६३९	मृतवस्त्रमृत्स्वनार्याषु,	मनु-विष्णु.,	८२२
,,	यम.,	६४०	*मृतस्य प्रसूतो यः,	बौधा.,	७११
मुख्यानां चैव रत्नानां,	मनु.,	५२८	मृतसाक्षिप्रमाणान्तु,	कात्या.,	१७१
,,	,,	५३४	मृताङ्गलम्रविक्रेतुः,	याज्ञ.,	५६४
मुख्या पैतामही भुक्तिः,	कात्या.,	१८०	मृतान्तरेऽर्थिनि प्रेते,	नार.,	१०८
मुख्यैः सह समूहानां,	बृह.,	४२५	मृतायां सर्वमादध्यात्,	याज्ञ.,	६९२
मुद्रां वा निक्षिपेत्,	कात्या.,	५१	मृते जीवति वा पत्यौ,	,,	६२९
मुद्राङ्कितं च यद्द्रव्यं,	बृह.,	३३८	मृते तु स्वामिनि पुनः,	नार.,	४५८
मुद्राशुद्धं क्रियाशुद्धं,	कात्या.,	१६९	*मृते द्रव्यामुष्यायणं,	हारी.,	७२३

मृते न पितरि क्लीब,	देव., ६६८
मृते पितरि कुर्युस्तं,	याज्ञ., ७०५
मृते पितरि पित्रंशं,	बृह., ३१२
मृते पितरि वा दत्ता,	ब्रह्मपु., ७२७
मृते भर्तरि जीवे वा,	देव., ६४१
मृते भर्तरि पुत्रस्तु,	मनु., ६०४
*मृते भर्तरि ब्रह्मचर्यं,	विष्णु., ६३५
मृते भर्तरि या तु स्त्री,	नार., ६४५
मृते भर्तरि या नारी,	अङ्गिरा., ६३२
मृते भर्तरि या साध्वी,	कात्या., ६३८
मृते भर्तरि सत्स्त्रीणां,	ब्रह्मपु., ६३४
मृते भर्तरि साध्वी स्त्री,	मनु., ६३७
मृते भर्तृपुत्रायाः,	नार., ६०३
मृतेऽमेधेन लेप्तव्यो,	अङ्गिरा., ८०५
मृते म्रियेत या पत्यौ,	बृह., ६३०
मृतेषु च न तत्पुत्रः,	नार., ३१२
मृतेषु च विशुद्धिः स्यात्,	नार., ४१७
मृतोऽनपत्योऽभायश्चत्,	बृह., ७५०
मृतोऽपि तत्र साक्ष्यं स्यात्,	नार., ११५
मृतोऽमेधेन लेप्तव्यो,	बृह., ८०५
मृदङ्गवादोपजीवनं,	हारी., ८३१
मृद्वाण्डासनखट्वास्थि,	नार., ५०६
मृन्मयानां च हरणे,	मनु., ५३५
मृन्मये भाजने कृत्वा,	पिता., २५०
मृषा मोक्षे च भोगे च,	देव., ६८६
मृषायुक्तं क्रियाहीनं,	बृह., ६१
मृषावाक्यस्य पापस्य,	नार., २२८
मेखलाभ्रमनिष्कास,	कात्या., ४५३
मेदान्प्रचुञ्चुमद्गूनां,	मनु., ८२९
मैत्रमौद्वाहिकं चैव,	याज्ञ., ६७६
मैत्रेयकं तु वैदेहो,	मनु-विष्णु., ८२१
मोक्षितो महतश्चार्णात्,	नार., ३८८
मोच्यः शुद्धः स सत्कृत्य,	नार., २३३
मोच्योऽमिक्षोऽपि सर्वस्वं,	बृह., ७६७
मोहात्प्रमादात्संहर्षात्,	कात्या-उशना. ४७५
”	उशना., ७७८
मोहाद्वा यदि वा शाठ्यात्,	कात्या., ७३

मौण्ड्यं प्राणान्तिको दण्डो,	मनु., ५८८
मौलास्ते तु समुद्दिष्टाः,	बृह., १९२
म्रियेतान्यतरो वापि,	मनु., ७५४
म्लेच्छचाण्डालपर्यन्तान्,	व्यास., १५७
म्लेच्छश्वपाकधूर्तानां,	कात्या., ७६९

## य

यं तु पाश्येन्निति राजा,	मनु., ७९३
यं धर्मं स्थापयेद्राजा,	कात्या., २५९
यं परंपरया मौलाः,	बृह., ७०७
यं ब्राह्मणस्तु शूद्रायां,	मनु., ७३४
*यं मातापितृभ्यां,	वसि., ७३३
यः कार्यकाले संप्राप्ते,	बृह. मनु., ४०६
यः कश्चिदर्थो निष्णातः,	याज्ञ., १५५
यः कश्चिद्वचकस्तेषां,	बृह., ३६०
यः क्षिप्तो मर्षयत्यातैः,	मनु., ४८
यः परार्थेऽपहरति,	नार., १२८
यः पश्चिमः क्रियाकारः,	बृह., ७७२
यः प्रश्नं वितथं ब्रूयात्,	मनु., १३२
यः साक्षी नैव निर्दिष्टो,	कात्या., ११४
यः साक्ष्ये श्रावितेऽन्येभ्यो,	याज्ञ., १४२
यः साधयन्तं छन्देन,	मनु., ३३०
यः साहसं कारयति,	” ५७३
यः स्वयं साधयेदर्थं,	मनु., ३२९
यः स्वामिनाऽननुज्ञातं,	” २९३
यः स्वामिना नियुक्तस्तु,	बृह., २७६
य एते विहिताः पुत्राः,	मनु., ७३५
य एवानुदके दोषः,	नार., ४५८
यच्चान्यस्य कृतं लेख्यं,	व्यास., १६७
यच्छिष्टं पितृदायेभ्यो,	नार., ६७२
यज्ञार्थं द्रव्यमुत्पन्नं,	कात्या., ६८७
यज्ञे स्वाम्याप्नुयात्पुण्यं,	बृह., ७६
यतन्ते रक्षितुं भार्या,	मनु., ६०३
यतात्मा गर्भमादध्यात्,	यम., ६४०
यत्किञ्चित्कुरुते राजा,	यम., ७७६
यत्किञ्चित्देव देयं स्यात्,	मनु., ६५९
यत्किञ्चित्तवर्षाणि,	मनु. बार. १८७

यत्किञ्चित् पितरि प्रेते,	मनु.,	६८२	यत्रानुकूल्यं दम्पत्योः,	याज्ञ.,	६१४
यत्तेन सदसि श्रोक्तं,	बृह.,	३४	यत्रानेन विधानेन,	कात्या.,	३६
यत्ते समधिगच्छन्ति,	देव.,	३९३	यत्रापवर्तते युग्यं,	मनु.,	५०२
यत्तैः प्राप्तं रक्षितं वा,	बृह.,	४२७	यत्रार्थं साधयेत्तेन,	नार.,	३४४
यत्त्वसत्संज्ञितैरङ्गैः,	कात्या.,	४७२	यत्राहितं गृहक्षेत्रं,	बृह.,	२९९
यत्त्वस्याः स्याद्धनं दत्तं,	मनु.,	६९०	यत्रैवं वेत्ति नृपतिः,	,,	२६०
यत्तेनैव विरुद्धं तु,	कात्या.,	११	यत्रैवं स्युः स्थिता वर्णाः,	कात्या.,	१६४
यत्पुनर्लभते नारी,	,,	६९४	यत्रैतास्तु न पूज्यन्ते,	मनु.,	६१०
यत्प्रनष्टं हृतं वा स्यात्,	व्यास.,	४१८	यत्रोक्तो माषको दण्डो,	कात्या.,	८०९
यत्प्रभृतार्थविषयम्,	,,	७०	यत्रोपविष्टा विप्राभ्याः,	बृह.,	२६
यत्र क्वचन जातेन,	श. लि. पैठी.,	७४२	*यथा कालमुत्तमवर्णक्षिपे,	श. लि.,	४७६
*यत्र क्वचन येन केन,	विष्णु.,	१५४	यथाकालोपयुक्तानि,	कात्या.,	६८०
*यत्र क्वचनोत्पादि,	,,	७३४	यथा गोऽश्वोष्टदासीषु,	मनु.,	७३८
यत्र तल्लिखितं पत्रे,	बृह.,	४२३	यथा च पथि तद्भाण्डं,	कात्या.,	४०७
यत्र ते नोपसर्पन्ति,	नार.,	५४६	यथा जलं कुक्षवेन,	बृह.,	७४३
*यत्र त्रिरात्रं विप्राणां,	ऋग्यशूक्.,	६७९	यथाजाति यथावर्णं,	याज्ञ.,	१०५
यत्रत्वेते परिध्वंसात्,	मनु.,	८२८	यथा ते नातिवर्तन्ते,	व्यास.,	५२७
यत्र धर्मो ह्यधर्मेण,	,,	३७	यत्रा त्रयाणां वर्णानां,	मनु-विष्णु.,	८२१
यत्र नार्यस्तु पूज्यन्ते,	,,	६७०	यथा त्वेवंविधः पक्षः,	कात्या-बृह.,	६१
यत्र नोक्तो दमः पूर्वैः,	उशाना.,	४८४	यथा धने तथर्णेऽपि	बृह.,	७०६
यद्यर्णो दाप्यतेऽर्थं,	बृह.,	३२५	यथा नयत्यसृक्पातैः,	मनु.,	१५
यत्रा वर्जयते राजा,	मनु.,	७८७	यथा नातिचरेतां तौ,	,,	६१४
यत्र वाप्युपधि पश्येत्,	,,	२७०	यथा पक्वेषु धान्येषु,	नार.,	९१
यत्र विप्रतिपत्तिस्स्यात्,	नार.,	१४	यथापराधं विप्रं तु,	यम.,	५७३
,,	,,	१५१	यथा पितृधने स्वाम्यं,	बृह.,	७२५
यत्र विप्रो न विद्वान्स्यात्,	कात्या.,	२८	यथा प्राप्तं न चेद्बुधुः,	नार.,	३७
यत्र वै भावितं कार्यं,	,,	१४९	यथा प्राप्तं विभज्येत,	कात्या.,	६९५
यत्र श्यामो लोहिताक्षो,	मनु.,	७९४	यथा ब्राह्मणचण्डालः,	मनु.,	६११
यत्र सभ्यो जनः सर्वैः,	नार.,	३८	यथा भागानुसारेण,	बृह.,	६८१
यत्र सभ्योऽन्यथावादी,	कात्या.,	३८	यथामियोगं धनिने,	कात्या.,	३५६
यत्र साक्षी दिशं गच्छन्,	बृह.,	१००	यथा यथा महदुःखं,	मनु.,	४८९
यत्र सातिशयं किञ्चित्,	मनु.,	६५६	यथार्पितान् पशून् गोपः	याज्ञ.,	४१४
यत्रस्था नोपहन्येत,	पिता.,	२१६	यथार्हतः संप्रणयेत्,	मनु.,	७७९
यत्रस्यात्परिहारार्थं,	कात्या.,	४८४	यथार्हमेतानभ्यर्च्य,	मनु.,	३२
यत्र स्यात्सोपधं लेख्यं,	,,	९७	यथा लेख्यविधौ तद्वत्,	कात्या.,	१६०
यत्र हिंसां समुत्पाद्य,	,,	३१६	यथाशक्त्यनुरूपं तु,	,,	५७४
यत्रानिबद्धो वीक्ष्येत	मनु.,	१०१	यथाशक्त्यं शिषकायान्,	नार-हारी.,	२५



यथा श्रुतं यथा दृष्टं,	मनु.,	१३३	यदि पुंसां गतिर्ब्रह्मन्,	महाभार.,	६०७
यथासंख्या निकृष्टानां,	बृह.,	२००	यदि प्रविष्टो नरकं,	व्यास.,	६३४
*यथासारापकारं,	श. लि.,	८०६	*यदि ब्राह्मणस्य,	वसि.,	७००
*यथेह पुरुषस्यात्मा,	श. लि.,	७२०	यदि वादी निराकाङ्क्षः	व्यास.,	१२२
यथैव शूद्रो ब्राह्मण्यां,	मनु-विष्णु.,	८२१	यदि संव्यवहारं प्राक्,	कात्या.,	२७५
यथैवात्मा तथा पुत्रः,	नार., मनु.,	७४७	यदि संशय एव स्यात्,	मनु.,	४४२
यथोक्तं तस्य तत्कुर्यात्,	कात्या.,	७८१	यदि संसाधयेत्तु,	,,	३८०
यथोक्तं द्विगुणं दण्डम्,	,,	७९८	यदि स्पृश्येत लेशेन,	नार.,	५४७
यथोक्तमार्तः स्वस्थो वा,	मनु.,	४०४	यदि स्वं नैव कुरुते,	कात्या.,	३५३
यथोक्तविधिना देयं	बृह-कात्या.,	२१२	यदि स्वाः स्वावराश्चैव,	मनु.,	६११
यथोक्तेन नयन्तस्ते,	मनु.,	४४६	यदि हि स्त्री न रोचेत्,	,,	६१३
यथोक्तेन विधानेन,	नार.,	२४९	यदि ह्यादावनादिष्टं,	कात्या.,	३२७
यथोपन्यस्तसाध्यार्थं,	बृहवसि.,	१५९	यदि ह्येकतरस्तेषां,	,,	६८६
यदपत्यं भवेदस्यां,	मनु.,	७२६	यदुज्ज्वलं चिरकृतं,	बृह.,	१६४
यदा कश्चित्प्रमीयेत्,	बृह.,	७५५	यदृच्छया च यः कुर्यात्,	नार.,	३६८
यदा कश्चित्समागच्छेत्,	,,	३६२	यदृच्छया नैव तु तान्,	नार.,	५४७
यदा कार्यवशा द्राजा,	कात्या.,	२४	यदृच्छास्मारिताः कुल्याः,	बृह.,	१०२
यदा तत्र वणिक्कश्चित्,	बृह.,	३६२	यदेवास्य पिता दद्यात्,	मनु.,	७०४
यदा तु द्विगुणीभूतं,	याज्ञ.,	२९६	*यदेवास्य पिता दद्यात्,	श. लि.,	७०४
यदा तु न विभाध्येते,	नार.,	२२२	यदेव भर्ता जानीयात्	महाभार.,	६२१
यदा तु न सकुल्याः स्युः,	,,	३३७	यदगृहीतं कुटुम्बार्थं,	बृह.,	३१४
यदा तु न स्युर्ज्ञातारः,	,,	४४९	यदत्तं स्यादविज्ञानात्,	नार.,	३८०
यदा मूलमुपन्यस्य,	कात्या.,	३५१	यदृष्टं दत्तशेषं वा,	कात्या.,	३०९
यदा रोगादि दोषेण,	ब्रह्मपु.,	४१७	यद्वद्रव्यं तत्स्वकं देयं,	,,	३७५
यदा विद्वेषिणस्ते तु,	बृह.,	७६९	यद्वयोरनयोर्वैथ,	मनु.,	१२४
यदा शुद्धा क्रिया पाल्या,	कात्या.,	१३८	यद्वालः कुरुते कार्यं,	नार.,	२७२
यदा साक्षी न विद्येत,	नार.,	९५	यद्भक्तः सोऽमियुक्तः स्यात्,	बृह.,	२४६
यदासामौरसो न स्यात्,	बृह.,	६९३	यद्यहुरतरं कार्यं,	बृह.,	८३
यदा स्वयं न कुर्यात्,	मनु.,	२४	यद्ययं पापकृन्मातः,	कालिका.,	२२१
यदि कार्यस्य सिद्धयर्थं,	कात्या.,	३७९	यद्यर्थिता तु दारैः स्यात्,	मनु.,	६६७
यदि कुर्यात् समानांशान्,	याज्ञ.,	६५४	यद्यन्यगोषु वृषभो,	,,	७३८
यदि चेत्स द्विभार्यः स्यात्,	कात्या.,	६८७	यद्यपि स्यात्तु सत्पुत्रो,	,,	७०३
यदि चेद्भूमिमेतेषाम्,	मनु.,	४५०	यद्यप्यस्य पिता दद्यात्,	बृह.,	७०२
यदि तत्कार्यमुद्दिश्य,	कात्या.,	३४८	यद्यत्तदास्य विद्येत,	कात्या.,	३०२
यदि देशो च काले च,	मनु-कात्या.,	४१५	*यद्यत्प्रकाशं हीनमूल्यं,	विष्णु.,	३५५
*यदि द्वौ ब्राह्मणीपुत्रौ,	विष्णु.,	७००	यद्यदाचर्यते येन,	कात्या.,	२५९
यदि न प्रणयेद्राजा,	मनु.,	७९५	यद्यद्विप्रेषु कुशलं,	यम.,	७८३

यद्यस्य पैतृकं रिक्थं,	मनु., ७०९	यस्तु तत्कारयेन्मोहात्,	,, ६११
यद्यस्मि पापकृन्मातः,	याज्ञ., २१८	यस्तु तां स्तेनयेद्वाचं,	नार., १२८
यद्येकजाता बहवः,	बृह., ६५९	यस्तु न ग्राहयेच्छिञ्चलपं,	कात्या., ३८४
यद्येकजाता बहवो,	,, ७४०	यस्तु पूर्वनिविष्टस्य,	मनु., ५६६
यद्येकजाता बहवः,	नार., ७५९	यस्तु प्रव्रजिताज्जातः,	यम., ८२७
यद्येकदेशप्राप्तापि,	कात्या., ९२	यस्तु प्रव्रजितापुत्रो,	अङ्गि., ५२७
यद्येकरीक्ष्यनौ स्याताम्,	मनु., ७०९	यस्तु रज्जुं घटं कृपात्,	मनु., ५३७
यद्येकशासने ग्राम,	बृह., १८९	यस्तु संञ्चारकस्तत्र,	मत्स्यपु., ५८१
यद्येको मातुषीं ब्रूयात्,	कात्या., ९२	यस्तु सर्वस्वमादाय,	कात्या., ३०२
यद्वचः प्रतिकूलार्थं,	नार., ४७१	यस्तु साधारणं हिंस्यात्,	बृह., ४२५
यद्वृत्तं व्यवहारे तु,	बृह., १५९	*यस्तूत्तमवर्णं दास्ये,	विष्णु., ३९८
यद्वयस्तपदमव्यापि,	कात्या., ७१	यस्त्वधर्मेण कार्याणि,	मनु., १७
यन्नामगोत्रैर्यल्लेख्यं,	प्रजापति., ९७	*यस्त्वधर्मेण द्रव्याणि,	आप., ६६५
यन्नावि किञ्चिद्वाशानां,	मनु., ७९०	यस्त्वनाक्षारितः पूर्व,	मनु., ५८१
यन्मे माता प्रच्छुमे,	,, ६०५	यस्त्वात्मदोषदुष्टत्वात्,	नार., १४०
यमयोश्चैव गर्भेषु,	,, ६६०	यस्त्वाधि कर्म कुर्वाणं,	कात्या., २९५
यमर्थमभियुञ्जीत,	नार., ८२	यस्त्वासन्नतरो ग्रामो,	नार., ५४५
यमिदो न दहत्यग्निः,	मनु., २५७	यस्त्विन्द्रियनिरोधेन,	कात्या., ५३
यमेव ह्यतिवर्तेरन्,	नार., ४९८	यस्त्वेतान्युप क्लृप्तानि,	मनु., ५३६
यमो वैवस्वतो देवो,	मनु., १३२	यस्त्वैश्वर्यान्न क्षमते,	,, ४८
ययोनिक्षिप्त आधिस्तु,	विष्णु., ३०१	*यस्मात्कुलधर्म,	श. लि., ७४०
यल्लब्धं लाभकाले तु,	कात्या., ६७८	यस्मात्तदावृत्तस्यर्थ,	कात्या., ६८४
यल्लेख्यं प्राड्विवाकेन,	,, १७६	यस्मात्कर्त्ता प्रभुस्तस्याः,	,, ३९५
यवाः सप्त प्रदातव्याः,	पिता., २४१	यस्मादपहृताल्लब्धं,	बृह. मनु., ५५४
यवीयान् ज्येष्ठभार्यायां,	मनु., ७०८	यस्माब्दीजप्रभावेण,	मनु., ८२४
यशो वित्तं फलरसौ,	बृह., १०	,,	,,
यश्च भर्त्रा धनं दत्तं,	व्यास., ६८४	*यस्माद्वर्णाः	श. लि., ८१५
यश्चाधरोत्तरानर्थान्,	मनु., ४८०	,,	,,
यश्चापि धर्मसमयात्,	,, ७७६	यस्मिन् कले यदा देयं,	नार., २४०
*यश्चार्थहरः सः,	विष्णु., ७५३	यस्मिन्नावेदिते पक्षे,	बृह., ४९
यश्चैवमुक्तवाहं दाता,	याज्ञ., ५७३	यस्मिन्वृणं सन्नयति,	मनु., ६५०
यश्चैषां वृत्त्युपादानं,	नार., ४२२	यस्मिन्नेतत्कुले नित्यं,	मनु., ६१३
यश्चैषां स्वामिनं कश्चित्,	,, ३९१	यस्मिन्भावोऽर्पितः स्त्रीणां,	श. लि., ७०१
यस्तत्र विनयः प्रोक्तः,	,, ३३२	यस्मिन्मयस्मिन् कृते कार्ये,	मनु., ४३१
यस्तत्र विपरीतः स्यात्,	याज्ञ., ४२१	यस्मिन् यस्मिन् विवादे तु,	मनु-विष्णु., २७०
यस्तत्र सङ्करश्चभ्रातृ,	कात्या., ४५५	यस्मिन् स्यात् संशयो लेख्ये,	नार., १६७
यस्तत्पजः प्रमीतस्य,	मनु., ७२१	यस्मै दद्यात्पितात्वेनां,	मनु., ६२८

यस्य कर्मणि यास्तु स्युः,	,,	३६५
यस्य जातस्य यमयोः,	देव.,	६६०
यस्य ते बीजतो जाताः,	मनु.,	७३५
यस्य दृश्येत सप्ताहात्,	मनु.,-नार.,	१४३
यस्य देशस्य यो धर्मः,	कात्या.,	२०
यस्य द्रव्येण यत्पण्यं,	,,	३३५
यस्य नोपरता भार्या,	बृह.,	७४६
यस्य नोपहता बुद्धिः,	नार.,	१०४
यस्य पश्येद्विप्तसाहात्,	विष्णु.,	२४७
यस्य पुत्रः शुचिर्दक्षः,	हारी.,	७४२
*यस्य पूर्वेषां षण्णां,	वसि.,	७१३
यस्य भार्या वशा साध्वी,	हारी.,	६२८
यस्य भुक्तिः फलं यस्य,	विष्णु.,	३०१
यस्य यत्पैतृकं रिक्थं,	,,	७०९
यस्य यो विहितो दण्डः,	कात्या.,	७९७
यस्य राज्ञश्च कुरुते,	मनु.,	२९
यस्य राष्ट्रे न सन्तीह,	यम.,	६००
यस्य वाभ्यधिका पीडा,	नार.,	५९
यस्य विद्वांश्च हि वदतः,	मनु.,	१३२
यस्य स्तेनः पुरे नास्ति,	,,	६००
यस्य स्वशक्त्या रक्षेत्तु,	नार.,	३६१
यस्याकर्ण्य प्रतिपदं,	लक्ष्मी.,	१
यस्याभियोगं कुरुते,	बृह.,	५१
यस्यार्थे येन यदत्तं,	कात्या.,	३०८
यस्येह प्रथिता कीर्तिः,	बृह.,	६६४
यस्योचुः साक्षिणः सत्यां,	याज्ञ.,	१५०
यां च भारामितप्ताज्ञो,	नार.,	१२७
यां तत्र चौरान् गृणीयात्,	,,	५४६
यां प्रसव्य वृको हन्यात्,	मनु-नार.,	४१७
यां रात्रिमजनिष्ठास्त्वं,	नार.,	१३५
यां रात्रिमधिविज्ञा स्त्री,	,,	१२७
या गर्भिणी संस्क्रियते,	मनु.,	७३०
याचमानाय दातव्यम्,	बृह.,	३०८
याचमानाय दौःशील्यात्,	कात्या.,	५२
याचितं स्वाम्यनुज्ञातम्,	बृह.,	३४९
याचितोऽर्धकृते तस्मिन्,	कात्या.,	३४८
याच्यमानं न दत्तं चेत्,	,,	२८७

याच्यमानस्तु यो दातुः,	नार.,	३४४
याच्यमानो न दद्याच्चेत्,	कात्या.,	२८७
याच्यमानो न दद्याद्वा,	बृह.,	३४४
याजनाद्यापनेनापि,	मनु.,	५५०
याज्यं क्षेत्रं च पात्रं च,	व्यास.,	६७९
या तस्य दुहिता तस्याः,	श.,	७५६
या तस्य भगिनी सा तु,	बृह.,	७५५
या तु कन्यां प्रकुर्यात्स्त्री,	मनु.,	५९७
या तु पत्या परित्यक्ता,	,,	७२८
या तु समधनैव स्त्री,	नार.,	३२३
यात्यचौराऽपि चोरत्वं,	नार.,	१४
याद्वगुणेन भर्त्रा स्त्री,	मनु.,	६०९
यादृच्छकः सावधिको,	बृह.,	२९२
यादृच्छके तु संयाज्ये,	नार.,	३६८
यादृच्छश्चोत्तरश्चैव,	बृह.,	९९
यादृशं तूप्यते बीजं,	मनु.,	७३७
यादृशं भजते हि स्त्री,	,,	६०७
यादृशा अर्थिभिः कार्या,	,,	१०४
यानस्य चैव यन्तुश्च,	,,	५०१
यानि कर्माण्यमिलपन्,	कात्या.,	५८०
यानि चैवं प्रकाराणि,	मनु.,	४४१
यान्त्यायान्ति जना येन,	बृह.,	४५४
यान्येव तृणकाष्ठानि,	नार.,	४११
*या पितृगृहेऽसंस्कृता,	वसि.,	७२९
*या ब्राह्मणी स्यादिह वै,	,,	६३१
* " " "	यम.,	६३१
यामुत्प्लुत्य वृको हन्यात्,	मनु-नार.,	४१७
या राज्ञा क्रोधलोभेन,	बृह.,	४५१
यावत्क्षीणदशं वस्त्रं,	नार.,	५२६
यावज्जीवं सदासीत,	यम.,	६३८
यावती संभवेद् बुद्धिः,	मनु.,	३२८
यावतो बान्धवान् यस्मिन्,	मनु-नार.,	१३२
यावत्स स्यात्समावृत्तो,	मनु.,	७५२
यावत्सस्यं विनश्येत्तु,	याज्ञ.,	४६७
यावच्च दद्यादेयं च,	कात्या.,	३२५
यावज्जाग्रौ दहेद्देहं,	अङ्गि.,	६३३
यावन्मात्रं समुद्दिष्टं,	नार.,	२४०

यावानध्वा गतस्तेन,	कात्या., ४०७	येन येन यथाङ्केन,	नार., ५३८
यावानवध्यस्य वधे,	मनु., ७९६	येनांशो यादृशो भुक्तः,	बृह., ७६०
या वा स्वाद्वीरसूरासां,	कात्या., ६१२	येनाङ्केनावरो वर्णः,	नार., ४९०
*याश्चानपत्याः स्त्रियः,	वसि., ६६३	ये नियुक्तास्तु कार्येषु,	मनु., ५६८
यास्तासां स्युर्वुहितरः,	मनु., ६८८	येनोपात्तं तु यद्द्रव्यं,	कात्या., १८३
या स्वपुत्रं तु जह्यात्स्त्री,	कात्या., ३२२	येऽन्ये ज्येष्ठकनिष्ठायां,	मनु., ६५६
युक्तरूपं ब्रुवन्सभ्यो,	नार., ३५	ये पातककृतां लोके,	याज्ञ., १२६
युक्तिं विना विचारेण,	बृह., १७	येऽपुत्राः क्षत्रविशूद्राः,	बृह., ७५२
युक्तियुक्तं तु कार्यं स्यात्,	कात्या., २६१	ये राष्ट्राधिकृतास्तेषां,	याज्ञ., ५६८
युक्तियुक्तं तु यो हन्यात्,	,, ४२१	ये व्यपेताः स्वकार्यस्य,	मनु., १३५
युक्तिलेशोङ्किताकार,	कात्या., ९६	येषां च न कृताः पित्रा,	नार., ६७०
युक्तिष्वप्यसमर्थासु,	तार., १९७	येषां ज्येष्ठः कनिष्ठो वा,	मनु., ७५४
युक्तिहीनविचारे तु,	बृह., १५	*येषां देयः पन्थाः,	विष्णु., ५६२
युक्त्या विभजनीयं तत्,	,, ६८०	येषामेताः क्रिया लोके,	नार., ७५८
युगहासादशक्योऽयं,	,, ६४३	ये समानास्तु तैः सार्धं,	बृह., ३६९
युग्यस्थाः प्राजकेऽनाप्ते,	मनु., ५०२	यै यैरुपायैरर्थं स्वं,	मनु., ३२४
युद्धीतामरणतक्षान्ता,	कात्या., ६८५	यैस्तु संस्क्रियते न्यासो,	कात्या., ३४९
युद्धोपदेशकश्चैव,	,, ५७४	योऽकामां दूषयेत्कन्यां,	मत्स्यपु., ५९५
युद्धोपचारिकं यत्तु,	महाभार., ६९८	योगक्षेमप्रचारं च,	मनु-विष्णु ६७८
ये कार्येभ्योऽर्थमेवं हि,	मनु., ५६८	योगक्षेमवतो लाभः,	बृह., ६८१
येऽक्षेत्रिणो बीजवन्तः,	,, ७३८	योगक्षेमावन्यथा चेत्,	मनु., ४१५
*येचाऽकुलीना,	विष्णु., ५६९	योगाधमनत्रिकीर्तं,	,, २७१
ये तु तिष्ठन्ति करणे,	बृह., ८७	योगी विवक्षुरुन्मत्तो,	व्यास., ५५
ये तु सभ्याः सभां प्राप्य,	नार., ३७	योऽगुणान्कीर्तयेत्क्रोधात्,	कात्या., ४७३
ये तत्र पूर्वसामन्ताः,	कात्या., ४४७	यो ग्रामदेशसङ्घानां,	मनु., ४२४
ये तदरण्यचरास्तेषां,	बृह., ३०	योज्यः समस्ताश्चैकस्य,	बृह., ७८१
ये द्विजानामपसदा,	मनु., ८२९	योज्य आधिस्तदुत्पन्ने,	याज्ञ., २९६
येन कार्यस्य लोभेन,	कात्या., १२२	यो ज्येष्ठो ज्येष्ठवृत्तिः स्यात्,	मनु., ६५०
येन केन चिदङ्केन,	मनु., ४९१	यो ज्येष्ठो विनिकुर्वीत,	,, ६६०
येन क्रीतं तु मूल्येन,	बृह., ३५५	यो दण्ड्यान्दण्डयेद्राजा,	याज्ञ., ७९५
*येन चैषां स्वयमुत्पादितं,	वसि., ६८२	योऽदत्तादायिनो हस्तात्,	मनु., ५४९
येन दोषेण शूद्रस्य,	कात्या., ५५१	यो ददाति स मूढात्मा,	दक्ष., ३७४
येन मूलहरोऽधर्मः,	मनु., ५८४	यो दर्शनप्रतिभुवं,	कात्या., ३२६
येन यज्ञं यथा देये,	बृह., ३०८	*यो धनमादधीत.,	स्मृति., ७५३
येन यावद्यथा मुक्तं,	,, ४५२	यो धर्मः समयश्चैषां,	नार., ४२२
येन युक्तं भवेत् पूर्वं,	,, ३०१	यो धर्म एकपत्नीनां,	मनु., ६३७
येन येन परद्रोहं,	कात्या., ५३७	,, ,	यम., ६३८

यो न दद्याद्देयमर्थं,	बृह., ८०६
यो न भ्राता न च पिता,	नार-कात्या., ७६
यो निक्षिप्तं नार्पयति,	मत्स्यपु., ३४५
यो निक्षेपं नार्पयति,	मनु., ३४५
यो निक्षेपं याच्यमानो,	,, ३४६
यो ब्राह्मण्यामगुप्तायां,	,, ५८८
यो भाटयित्वा शकटं,	बृहमनु., ४१२
यो भाषतेऽर्थवैकल्यं,	मनु., १३२
योऽभिमुक्तः परेतः स्यात्,	याज्ञ., १८४
योऽमिशस्तस्तत्क्षमते,	बृह., ८३
यो भुङ्क्ते परदायी तु,	,, ३८५
यो भुङ्क्ते बन्धकं लोभात्	,, २९२
यो मन्येताऽजितोऽस्मीति,	याज्ञ., २६८
यो यथा निक्षिपेद्वस्तु,	मनु., ३४१
यो यस्य प्रतिभुस्तिष्ठेत्,	मनु., ३०६
यो यस्य विदितः कालो,	पितामह., २०३
यो यस्यार्थे विवदते,	कात्या-नार., ७६
यो याचितकमादाय,	कात्या., २८७
"	,, ३४८
यो यावत्कुरुते कर्म,	याज्ञ., ४०१
यो यावज्जिह्वीतायं,	मनु., ३३१
"	,, २६४
यो यो वर्णोऽवहीयेत्,	नार., ७७५
योऽर्थः श्रावयितव्यः	,, ११५
योऽर्थिनार्थः समुद्दिष्टः	कात्या., ६९
यो लोभादधमो जात्या,	मनु., ५६५
यो वा तद्विषयमादद्यात्,	नार., ३१८
यो वा यस्मिन् समाचारः,	कात्या., ६५
यो विद्यमानं प्रधानं,	,, ३०२
यो हस्तयोः क्वचिद्विधः,	विष्णु., २३३
यो हि याचितमादाय,	मत्स्यपु., ३४८
यो ह्यासन्नतरस्तेषां,	बृह., ७५१
यौवने वर्तमानानां,	महाभारत., ६०७
यौ श्रुत्वा सत्यमेवेह,	नार., १२८

र

रक्तं तदसितं कुर्यात्,	कात्या., २४१
रक्तमाल्याम्बरधरः,	नार., ४४५

रक्तमाल्याम्बरधरः,	बृह., ४४५
रक्तस्रग्वसनाः सीमां,	याज्ञ., ४४२
*रक्षणान्तु भर्तुं,	गौत., ७३९
रक्षणाद्धर्मभाप्राजा,	मनु., ७९३
रक्षन्ति शय्यां भर्तुं श्वेतं,	श., ७५६
रक्षा प्रमादान्नुपतेः	नार., ८२८
रक्षिता यत्नतोऽपीह,	मनु., ६०४
रक्षितारं न मृष्यन्ति,	महाभार., ६०८
रक्षोत्कन्यां पिता विज्ञां,	याज्ञ., ६०२
*रक्षेद्राजा बालानां,	श. लि., ७५३
रक्षेद्वा कृतमूल्यं तु,	बृह., ३२९
रक्ष्यमाणोऽपि यथाधिः,	नार., २२५
*रक्षावतरणं,	विष्णु., ८३१
रक्षावतारपाखण्ड,	याज्ञ., ११२
रज्जुच्छेदेऽक्षभङ्गे,	व्यास., २२३
रत्नानां चैव सर्वेषां,	नार., ५३३
*रत्नापहर्तुस्तमसाहसं,	विष्णु., ५३४
रथं हरेदथाध्वयुः,	मनु-बृह., ३६६
*रथकाराम्बष्ठ,	उसना., ८१४
"	,, ८१४
रश्मिमूलगते भानौ,	बृह., २००
रहःकृतं प्रकाशं च,	व्यास., ९४
रहो जितोऽनमिश्रश्च,	बृह., ७६७
रहोदत्ते निधौ यत्र,	,, ३४७
रागद्वेषपरीताश्च,	नार., २७२
रागादिना यदैकेन,	नार.-कात्या., ४८
राजकार्यनियुक्ताश्च	कात्या., ३०३
राजकीयं स्मृतं लेख्यं,	,, १५३
राजक्रीडासु ये शक्ता,	,, ५६९
राजगामी निधिः सर्वैः,	नार., ७९२
राजग्राह्यहीतो वा,	,, ४६८
राजचौरादिकभयात्,	बृह., ३३८
राजदुष्टानि भाषेत,	यम., ५७३
राजदैवभयाद्यस्तु,	बृह., ३६०
राजदैवोपघातेन,	याज्ञ., ४३१
राजद्रोहे साहसेषु,	विष्णु., २११
राजधर्मान् स्वधर्माश्च,	कात्या., ७७४

राजनि प्रहरेद्यस्तु,  
राजनि स्थाप्यते योऽर्थः,  
राजन्यवैश्य शूद्राणां,  
\*राजन्यायां,  
\*राजन्यावैश्यापुत्र,  
राजन्येऽग्निर्धत्तं विप्रे,  
\*राजन्येन,  
राजपत्न्यमिगामी च,  
\*राजपुत्रापहारैषु सहस्रं,  
राजप्रसादलब्धं च,  
राजप्रसादादन्यत्र,  
राजभिः शङ्कितानां च,  
राजमूलमिदं राष्ट्रं,  
राजयानासनासोढुः,  
राजलैख्यं स्थानकृतं,  
राजवृत्तिप्रवृत्तास्ते,  
राजशासननीता च,  
\*राजसाक्षिकं ससाक्षिकं,  
राजस्वं श्रोत्रियस्वं च,  
राजा कार्याणि संपश्येत् ,  
” ”  
राजा कृत्वा पुरे स्थानं  
राजा गुरुर्यमश्चैव,  
राजाग्निबान्धवेभ्यश्च,  
राजाज्ञया समाहृतः  
राजा तदात्मसात्कुर्यात् ,  
राजा तु धार्मिकान्सभ्यान् ,  
राजात्ववहितः सर्वान् ,  
राजाऽऽदधीत षड्भागं,  
राजादेशेन मोक्तव्या,  
राजानं स्वामिनं विप्रं,  
राजानमामन्त्र्य ततः,  
राजानो मन्त्रिणश्चैव,  
\*राजा पुरोहितं,  
राजा प्राड्विवाकः,  
राजा भवत्यनेनास्तु,  
राजार्थमोषकाश्चैव,

नार,	४९०
याज्ञ,	५१७
कात्या.,	३९६
वसि.,	८१७
गौत.,	७०१
कात्या.,	२०४
वसि,	८१७
याज्ञ.,	५६७
श. लि.,	५२९
बृह.,	४२७
नार.,	४५९
पिता.,	२११
राक्ष-लि.,	७७६
याज्ञ.,	५६४
बृह.,	१५२
कात्या.,	३१
नार.,	४४८
विष्णु.,	१५३
मनु-नार,	१९०
बृह.,	२६
,,	४४
याज्ञ.,	४१९
अगिराः,	७९५
ब्रह्मपु.,	७२७
कात्या.,	१६५
नार,	३६३
,,	२७
,,	७७५
बृह.,	३६२
कात्या.,	५९८
,,	३२४
नार.,	४५८
कात्या.,	७९६
आप.,	७७८
गौत.,	९
मनु.,	३५
कात्या.,	५६९

राजा लब्ध्वा निधिं दद्यात् ,  
राजा विनिर्णयं कुर्यात् ,  
राजाऽविरोधधर्मायै,  
राजा वृत्तिविवादानां,  
राजा सपुरुषः सभ्या,  
राजास्य भाण्डं तद्रक्षेत् ,  
राज्ञः कोशापहर्तृश्च,  
राज्ञः प्रख्यातभाण्डानि,  
राज्ञः स्वहस्ततो मुद्रा,  
राज्ञः स्वहस्तसंयुक्तं,  
राज्ञ एव तु दासः स्यात् ,  
\*राज्ञं विंशति भागः शुक्रः,  
राज्ञश्च द्विगुणं दण्डं,  
राज्ञश्च प्रकृतो विद्वान् ,  
राज्ञस्ततः स विख्यातो,  
राज्ञां च क्रमशो नाम,  
राज्ञां तु शापदग्धानां,  
राज्ञा तु विनिवार्यस्ते,  
राज्ञा तु स्वयमादिष्टः,  
राज्ञा दापयितव्यः स्यात् ,  
राज्ञा दापयितः स्यात् ,  
राज्ञा दाप्यः सुवर्णं स्यात् ,  
राज्ञाऽधर्मर्णिको दाप्यः,  
राज्ञाऽन्यायेन यो दण्डो,  
राज्ञा परिग्रहीतेषु,  
राज्ञा प्रवर्तितान् धर्मान् ,  
राज्ञामाज्ञाप्रतीधातः,  
राज्ञा मोचयितव्यास्ते,  
राज्ञा ये विदिता संयक् ,  
राज्ञा विवर्जितो बस्तु,  
राज्ञा सन्निहं निवार्याः,  
”  
राज्ञा सर्वं प्रदाप्यः,  
राज्ञी प्रव्रजिता घात्री,  
राज्ञे कुर्यात्पूर्व,  
राज्ञे तदकृतं कार्यं,  
राज्ञे दत्त्वा तु षड्भागं,

याज्ञ.	७९२
मनु.	३४७
बृह.	१५४
कात्या.	१०
नार.	४२
,,	३६२
मनु.	५६८
,,	५१६
प्रजापति.	१६८
कात्या.	१५३
नार.	३८९
गौत.	५१८
मत्स्यपु.	४१०
मनु.	२७
कात्या.	३००
,,	६०
ब्रह्मपु.	७३६
बृह.	४२५
व्यास.	१५७
यम.	३३४
बृह.	४०८
मनु.	३८०
याज्ञ.	३३४
,,	८०६
नार.	११४
कात्या.	४२३
नार.	७७३
,,	३९१
बृह.	३०
,,	४८
यात.	५२१
,,	७६८
,,	१४३
नार.	५८७
,,	५९
कात्या.	३९८
बृह.	३७१

राज्ञे दशांशमाहृत्य,	कात्या.,	३७१
राज्ञोऽनिष्टप्रवक्तारं,	याज्ञ.,	४८३
राज्ञो भूतिर्यशस्तुष्टिः,	देव.,	८३३
राज्ञिः सन्ध्ये च धर्मश्च,	मनु.,	१२५
रात्रिसञ्चारीणो ये च,	नार.,	५४५
*रात्रो चरन्ती गौः,	श. लि.,	४६४
रात्रौ न विचरेयुस्ते,	मनु.,	८३२
राष्ट्रस्य वा समस्तस्य,	बृह.,	४८
राष्ट्रादेन बहिः कुर्यात्,	मनु.,	७८३
राष्ट्रान्तकरणावेतौ,	,,	७६२
राष्ट्रीयैः सह तद्राष्ट्रं,	,,	८२८
राष्ट्रेषु रक्षाधिकृताः,	,,	५६८
राष्ट्रेषु राष्ट्राधिकृतान्,	,,	५५०
रिक्तभाण्डानि यत्किञ्चित्,	,,	७८९
*रिक्थग्राहिभिरिते भर्तव्याः,	विष्णु.,	६६८
रिक्थपिण्डप्रदानेन,	बृह.,	७४१
रिक्थादर्धं समादयुः,	नार.,	७२३
रिक्थिनं सुहृदं चापि,	कात्या.,	३२४
रुच्या वान्यतरः कुर्यात्,	याज्ञ.,	२१०
*रुधिरस्त्रावे न साक्षिणः,	श. लि.,	१९६
रूपसंख्यादिलामेषु,	बृह.,	३३१
रोगिभ्योऽर्थं समादत्ते,	,,	५२०
रोगोऽभिज्ञातिमरणं,	कात्या.,	२४७
,,	पिता.,	२४७
,,	मनु-नार.,	१४३
,,	विष्णु.,	२४७

## ल

लक्षणाग्न्येव साक्षित्वे,	नार.,	१९५
लक्षयेयुः क्षताक्षिनि,	पिता.,	२२६
लम्पकं दापयेदेव,	कात्या.,	३०४
लब्धे तु चौरै यदि वा,	,,	५५३
लब्धेऽर्थेऽभ्यर्थनं मोहान्,	बृह.,	६०
लभते दक्षिणाभावं,	नार.,	३६३
लभेत चेन्न द्विगुणं,	कात्या.,	३२८
लभेत तत्सुतो वापि,	,,	६६३
लभेतांशं स पित्र्यं तु,	कात्या.,	६६३
लभेताजीवनं शेषं,	मनु.,	७०४

लभेतासौ त्रिपक्षं वा,	कात्या.,	६५
ललाटे खिद्यते चास्य,	याज्ञ.,	७८
ललाटाङ्को ब्राह्मणस्य,	बृह.,	७८२
ललाटे चामिशस्ताङ्कः,	नार.,	५७३
ललाटे वाङ्मकरणं,	यम.,	७८६
लवणस्नेहमधेषु,	बृह.,	२८९
लभं तत्र प्रमाणं स्यात्,	,,	७७१
लाभगोवीर्यसस्यानां,	नार.,	४००
लाभार्थं वणिजां सर्वं,	नार.,	४३४
लाभालाभौ यथा द्रव्यं,	याज्ञ.,	३५९
लालिता निगृहीता च,	महाभार.,	६१०
लिखितं तत्प्रमाणं तु,	कात्या.,	१६८
लिखितं बलवन्नित्यं,	नार.,	१८२
लिखितं मुक्तकं चापि,	कात्या.,	३१६
लिखितं साक्षिणश्च द्वौ,	नार.,	२७८
लिखितं साक्षिणो भुक्तिः,	व्यास.,	२५८
लिखितं साक्षिणो वापि,	नार.,	३१
लिखितं ह्यमुकेनेति,	याज्ञ.,	१५५
लिखितः स्मारितश्चैव,	नार.,	३९
लिखितस्याधुना वच्मि,	कात्या.,	१५२
लिखितस्येति धर्मोऽर्थं,	,,	६८७
लिखिता तु सदा धार्या,	,,	२३
लिखितेनाप्नुयात्सिद्धिं,	मरीचि.,	१५२
लिखिते साक्षिवादे तु,	बृह.,	९४
लिखितो लेखितो गूढः,	,,	९९
लिखितौ द्वौ तथा गूढौ,	,,	१०२
लिङ्गं छित्वा वधस्तत्र,	याज्ञ.,	५९३
लिङ्गत्य छेदने मृत्यौ,	,,	४९९
लिङ्गिनः श्रेणिपूगाश्च,	कात्या.,	१०७
,,	,,	३१
लिङ्गिनस्तस्कराः कुर्युः,	बृह.,	३१
लिङ्गिनां प्रसवानां तु,	कात्या.,	२०८
लुब्धातिवृद्धा बालाश्च,	बृह.,	४२०
लेखकः प्राड्विवाकश्च,	कात्या.,	१०१
लेखयित्वा तु यो वाचा,	,,	८२
लेख्यं कृत्वा स्वनामाङ्कं,	बृह.,	१६६
लेख्यं तु त्रिविधं प्रोक्तं,	,,	१५२

लेख्यं तु द्विविधं ज्ञेयं,  
 लेख्यं तु साक्षिमत्कार्यं,  
 लेख्यं त्रिशत्समातीतं,  
 लेख्यं दद्याद्विशुद्धं,  
 लेख्यं यच्चान्यनामाङ्कं,  
 लेख्यं वा साक्षिणो वापि,  
 लेख्यं वा साक्षिमत्कार्यं,  
 लेख्यं सिध्यति सर्वत्र,  
 लेख्यं स्वहस्तसंयुक्तं,  
 लेख्यं हीनाधिकं भ्रष्टं,  
 लेख्यक्रिया तिरस्येत,  
 लेख्यचारेण लिखितं,  
 लेख्यदोषास्तु ये केचित्,  
 लेख्यधर्मो सदा श्रेष्ठो,  
 लेख्यमालेख्यवत्केचित्,  
 लेख्यस्य पृष्ठेऽमिलिखेत्,  
 लेख्यस्योपरि यत्साध्यं,  
 लेख्याभावे तु तां तत्र,  
 लेख्यालुढं साक्षिमद्रा,  
 लेख्यालुढश्चेतरश्च,  
 लेख्यालाभारस्मृतं तावत्,  
 लेख्ये च सति वादेषु,  
 लेख्ये देशान्तरं नीते,  
 लेख्येन भोगविद्विर्वा,  
 लेख्येन साक्षिभिर्वापि,  
 लेख्ये लेख्यक्रिया प्रोक्ता,  
 लेशैरभ्यनुगन्तव्या,  
 लेशोद्देशस्तु युक्तिस्स्यात्,  
 लोकपालास्तदादित्या,  
 लोकप्रसिद्धं स्वकृतात्,  
 लोकवेदाङ्गधर्मज्ञाः,  
 \*लोकवेदवेदाङ्गवित्,  
 लोकसंव्यवहारार्थं,  
 \*लोकाः प्रतिग्रहार्थं,  
 लोकानन्त्यं दिवः प्राप्तिः,  
 लोकान्तरगतो वापि,  
 लोके संव्यवहारार्थं,

नार., १५३  
 कात्या., १६१  
 बृह., १७४  
 नार., ३३७  
 ,, १६७  
 बृह., १२१  
 याज्ञ., १५५  
 नार., १७०  
 कात्या., २६६  
 नार., ६१  
 कात्या., १७३  
 ,, १६५  
 बृह-कात्या., १२०  
 ,, १७३  
 व्यास.,-बृह., १६६  
 याज्ञ., ३३६  
 संवर्तः., ७२  
 विष्णु-कात्या., १७८  
 बृह., २७८  
 कात्या., ४४२  
 ,, १७६  
 ,, ९३  
 नार-कात्या., १७५  
 बृह., १९२  
 ,, ३३०  
 संवर्तः., १७२  
 नार., ५४३  
 कात्या., ९२  
 पिता., २१६  
 व्यास., १७२  
 बृह., २७  
 गौत., ७८३  
 मनु., ८०७  
 बौधा., १३७  
 याज्ञ., ७४३  
 देव., ६४१  
 बृह., ८०८

लोकेऽस्मिन् द्वाववक्तव्यौ,  
 लोकेऽस्मिन् द्विविधं द्रव्यं,  
 \*लोप्सहस्तश्चौरः,  
 लोभद्वेषादिकं त्यक्त्वा,  
 लोभात्सहस्रं दण्डस्तु,  
 लोभाद्भयाद्वा यो राजा,  
 लोभान्मोहाद्भयान्मैत्र्यात्,  
 लोहानामपि सर्वेषां,

नार., ४८३  
 ,, ४२९  
 शङ्ख., लि., १९६  
 बृह., ३४  
 मनु., १४१  
 बृह., ५७१  
 मनु., १४१  
 नार., ५२४

व

वंशादिकं यस्य राजा,  
 वक्तव्यं तत्प्रियं यत्र,  
 वक्तव्यं साक्षिभिः साक्ष्यं,  
 वक्तव्येऽर्थे न तिष्ठन्तं,  
 वक्ताध्यक्षो नृपः शास्ता,  
 वचनं यत्रमिद्येत,  
 वचनातत्र न स्यात्तु,  
 वचनालुल्यदोषः स्यात्,  
 वचनाद्दोषतो मेदात्,  
 वणिक्च्छिन्नप्रयोगेषु,  
 वणिकूपथं च ये कुर्युः,  
 वणिक्रप्रभृतयो यत्र,  
 वणिग्भिस्स्यात्कतिपयैः,  
 वणिग्विक्रीतपण्यस्तु,  
 वणिग्वीथीपरिगतं,

बृह., १५९  
 कात्या., ३५  
 ,, १३७  
 कात्या-नार., ५१  
 बृह., २७  
 नार., ११४  
 कात्या., ४८४  
 नार., ४८४  
 नार., १०८  
 कात्या., ३१  
 बृह., ७५९  
 नार., ३५८  
 कात्या., ३०  
 बृह., ५६  
 ,, ३५६

वणिजः कर्षकाश्चैव,  
 वणिजां कर्षकाणां च,  
 वणिजो हेमकाराश्च,  
 वत्सनामिनिभं पीतं,  
 वदेत्वावी स हीयेत,  
 वधः संग्रहणं स्तेयं,  
 वधः सर्वस्वहरणं  
 वधकश्चित्रकृच्छ्रः,  
 वधदण्डो भवेत्तस्य,  
 वधबन्धभयाच्चैव,  
 वधस्तत्र प्रवर्तेत,  
 वधाञ्छेदार्हविप्रो,

मरीचि., ३५७  
 कात्या., ३२५  
 ,, ३७२  
 पिता., २१७  
 कात्या., २४१  
 ,, ८२  
 बृह., ४७  
 नार., ५५८  
 ,, ११०  
 मत्स्यपु., ५९४  
 महाभा., ६०८  
 कात्या., ५८५  
 ,, ८०१



वधादृते ब्राह्मणस्य,	नार.,	५७३	वर्णाश्रमाणां संस्थानं,	श. लि.,	७७६
वधार्हः सुवर्णशतं,	बृह.,	८०१	वर्णानां हि वधो यत्र,	याज्ञ.,	१४७
वधे च प्राणिनां साक्ष्यं,	कात्या.,	१३६	वर्तेत चेत्प्रकाशं तु,	कात्या.,	७६३
वधेन गोपो मुच्येत,	नार.,	४६५	वर्तेत याम्ययावृत्त्या,	मनु.,	११
वधेन शासयेत्पापम्,	कात्या.,	७९९	वर्षाणि विंशतिं भुक्ता,	व्यास.,	१८१
वधेनापि यदा त्वेनं,	मनु.,	७८१	वर्षाणि विंशतिं यस्य,	,,	१८६
*वध्यः शूद्र आर्यायां,	आप.,	५९०	वर्षाणि विंशतिं यावत्,	कात्या.,	१७०
*वध्य घातित्वं,	विष्णु.,	८३१	वर्षान्यष्टौ स भोक्तास्यात्,	,,	४५९
वध्यवासांसि गृह्णीयुः,	मनु.,	८३२	वर्षासु षड्यवा मात्रा,	नार.,	२४१
वध्यांश्च हन्युः सततं,	,,	८३२	वर्षासु समये वह्निः,	नार.,	२०३
वनस्पतीनां सर्वेषां,	,,	५०३	वल्गभाश्च न पृच्छेयुः,	कात्या.,	११३
वन्दिग्राहास्तथा वाजि,	याज्ञ.,	५३०	वशाऽपुत्रासु चैवं स्यात्,	मनु.,	६८५
वन्ध्यां स्त्रीजननीं निन्द्यां,	नार.,	६१६	वसानस्त्रीन् पणान्,	याज्ञ.,	५२६
वयः कर्म च वित्तं च,	याज्ञ.,	७७९	वसिष्ठः शपथं शेपे,	नार.,	२५५
वरं कूपशताद्वापि,	नार.,	१२७	*वसिष्ठकाश्यपयोः,	श. लि.,	७४०
वरं क्रतुशतात्पुत्रः,	,,	१२७	वसिष्ठवचनप्रोक्तं,	बृह.,	२७८
वर्चस्थानं वह्निचयं,	बृह.,	४५३	वसिष्ठविहितां वृद्धिं,	मनु.,	२७९
वर्जिताः पञ्च धनिनां,	ब्रह्मपु.,	७३६	वसिष्ठश्चापि शपथं,	,,	२५५
वर्णं रूपं प्रमाणं च,	मनु.,	५५५	वसेयुरेते विज्ञाताः,	,,	८२९
वर्णकमालङ्कृतं द्वित्रि.,	याज्ञ.,	२८१	,,	,,	८३२
वर्णवाक्यक्रियायुक्तं,	नार.,	१६१	वस्त्रं पत्रमलङ्कारः,	मनु-विष्णु.,	६७८
*वर्णक्रमेण चतुस्त्रि,	विष्णु.,	६९९	वस्त्रकुप्यहिरण्यानां,	व्यास.,	४३६
वर्णक्रमेण सर्वाणि,	मनु.,	५८	वस्त्रधान्यहिरण्यानां,	याज्ञ.,	२८९
वर्णसंकरजातानां,	कात्या.,	२०८	वस्त्रादयोऽविभाज्या,	बृह.,	६८०
वर्णसंकरदोषश्च,	नार.,	७७४	वस्त्रान्नहीनः कान्तारे,	,,	१५४
*वर्णसंकरादुत्पन्नान्,	बौधा.,	८१९	*वाकोवाक्येतिहास,	गौत.,	७८३
वर्णस्वराकारभेदात्,	नार.,	५४३	वाक् चक्षुः पूजयति नो,	याज्ञ.,	७८
वर्णानामनुलोमानां,	उशना.,	६६२	वाक्छलानुत्तरत्वेन,	बृह.,	२५९
वर्णानामानुलोम्येन,	कात्या.,	३९६	वाक्पारुण्यादिना नीचो,	,,	४९७
वर्णानामानुलोम्येन,	याज्ञ.,	४७५	वाक्पारुष्ये च भूमौ च,	कात्या.,	९३
वर्णान्त्यस्य सदा दोषं,	कालि.पु.	२०५	वाक्पारुष्ये यथैवोक्ताः,	,,	४९२
वर्णानां नियमं धर्मं,	कात्या.,	२०	वाक्पारुष्यं तथैवोक्तं,	नार.,	४२
वर्णानां प्रातिलोम्येन,	नार.,	३९६			
वर्णानां संकरं चक्रे,	मनु.,	६४२			
वर्णापेतमविज्ञातं,	,,	८२८			
वर्णावरेष्वंशहानिः,	नार.,	६९७			
वर्णाश्रमविलोपश्च,	बृह.,	७७५			

## वा

वाक्प्रतिपक्षं कुटुम्बिना देयं,	विष्णु.,	३१४
वाक्याभावे तु सर्वेषां,	कात्या.,	१८
वाक्यैर्विभावयेल्लिङ्गैः,	मनु.,	७७
वाग्दण्डश्चैव धिग्दण्डो,	बृह.,	७८२

वाग्दण्डं प्रथमं कुर्यात्,  
 वाग्दण्डयोश्च पारुष्ये,  
 वाग्दण्डस्ताडनं चैव,  
 वाग्दैवत्यैश्च चरुभिः,  
 वाग्धिग्दण्डं वधं चैव,  
 वाग्धिग्दमं परित्यागं,  
 वाचं न वदति त्रस्तः,  
 वाचा च यत्प्रतिज्ञातं,  
 वाचिकी तु न सिध्येत्सा,  
 वाचिकी यदि सामर्थ्यात्,  
 वाजिवारणबालानां,  
 वाणिज्यं कारयेद्दैश्यं,  
 वाणिज्याद्याः सहैतैस्तु,  
 वातायनं प्रणालीश्च,  
 वादकाले तु वक्तव्याः,  
 वादसंक्रमणं ज्ञेयो,  
 वादान्पश्येदात्मकृतान्,  
 वादित्रतूर्यधोषैश्च,  
 वादिना यदभिप्रेतं,  
 वादिनो न च दण्ड्यास्स्युः,  
 वादिभ्यामभ्यनुज्ञातं,  
 वादिसंप्रतिपत्या वा,  
 वादेष्ववचनीयेषु,  
 वादो वर्णानुपूर्व्येण,  
 \*वाद्यभाण्डालङ्कार,  
 \*वानप्रस्थधनं,  
 वानप्रस्थयतिव्रह्म,  
 वापीकूपतडाकानि,  
 \*वापीतडागोद,  
 वामहस्तेन वा स्रग्वी,  
 वार्धक्ये च शिशूनां तु,  
 वासः कौशेयवर्जं,  
 वासः पञ्चजदानानां,  
 वासनस्थमनाख्याय,  
 वासांसि मृतचैलानि,  
 वाहयन्साहसं पूर्वं,  
 \*विंशं पौनर्भावाय,

मनु., ७८१  
 मनु-नार., ११७  
 कात्या., ४९२  
 मनु., १४७  
 बृह., ७८१  
 ,, ४२५  
 कालिकापु., ७९  
 हारी., ३७७  
 संवर्तः, १७२  
 ,, १७३  
 कात्या., ५२९  
 मनु., ७७६  
 बृह., ३५८  
 ,, ४५३  
 बृह-कात्या., १२०  
 नार., ८१  
 बृह., ४६  
 पिता., २१६  
 कात्या., ९०  
 ,, ७६  
 नार., ६३  
 व्यास., २५८  
 मनु-नार., ४७६  
 बृह., ५८  
 श. लि., ८००  
 विष्णु., ७५४  
 याज्ञ., ७५४  
 बृह., ४४०  
 श. लि., ५६६  
 उशना., ४७  
 बृह., ४४१  
 नार., ५०६  
 ,, ५५७  
 याज्ञ., १८७, ३३८  
 मनु., ८३२  
 मनु., ५००  
 हारी., ७११

\*विंशतिभागो ज्येष्ठस्य,  
 विंशत्यब्दे दशाहं तु,  
 विंशत्संवत्सराद्देयम्,  
 विकर्मक्रियया नित्यं,  
 विकर्मस्थान् शौण्डिकांश्च,  
 विकारो वाऽन्यथा गात्रे,  
 विकृष्यमाणे क्षेत्रे तु,  
 विक्रयं चैव दानं च,  
 विक्रयं वा क्रिया तत्र,  
 विक्रयादानसंबन्धे,  
 विक्रयाद्यो धनं किञ्चित्,  
 विक्रयावक्रयाधानं,  
 विक्रये चैव दाने च,  
 ,,  
 विक्रियाद्धान्धवः स्नेहात्,  
 विक्रीणतां च विहितो,  
 विक्रीणानस्तदन्यत्र,  
 विक्रीणीते परस्य स्वं,  
 विक्रीणीते स्वतन्त्रः सन्,  
 विक्रीतमपि विक्रेयं,  
 विक्रीयते दमस्तत्र,  
 विक्रीयतेऽसमक्षं यत्,  
 विक्रीय पण्यं मूल्येन,  
 विक्रीय वस्त्राभरणं,  
 विक्रीयसंप्रदानं च,  
 विक्रीयसंप्रदानं तत्,  
 विक्रेता ब्राह्मणस्त्वेषां,  
 विक्रेता वात्मनः शास्त्रे,  
 विक्रेतुः प्रतिदेयं तत्,  
 ,,  
 विक्रेतुरेव सोऽनर्थो,  
 विक्रेता दर्शितो यत्र,  
 विक्रोशन्त्यो यस्य राष्ट्रं,  
 विक्रोशमानां यो भक्तां,  
 विग्रहाज्जायते नृणां,  
 विग्रहे विजये लामे,  
 विषुष्य तु हृतं चौरैः,

गौत., ६५६  
 कात्या., ६५  
 ,, ३३१  
 मनु., ५२७  
 मनु., ५२७  
 कालिकापु., ७९  
 नार., ४५९  
 कात्या., ३७४  
 बृह., ७७२  
 कात्या., ९३  
 मनु., ३५२  
 याज्ञ., ५२६  
 कात्या., २७६  
 ,, ६८४  
 नार., ११८  
 याज्ञ., ५१६  
 नार., ४३३  
 मनु., ३५१  
 नार., ३८८  
 याज्ञ., ४३३  
 ,, ४३२  
 नार., ३५०  
 ,, ४२९  
 बृह., ६८१  
 नार., ४२  
 नार., ४२९  
 ,, ११०  
 ,, ३८८  
 ,, ४३५  
 बृह., ४३७  
 नार., ४३१  
 बृह., ३५१  
 मनु., ५११  
 कात्या., ३९९  
 बृह., ८५  
 कात्या., ७६८  
 मनु-नार., ४१५

विचारयतिः येनासौ,	व्यास.,	२५	विद्वानशेषमादद्यात्,	याज्ञ.,	७९२
विचार्य कार्यं न्याय्यं चेत्,	कात्या.,	५१	विद्वेषिणो व्यसनिनो,	बृह.,	४२०
विचार्य तत्कृतं राजा,	बृह-कात्या.,	२६८	*विधनस्य स्त्रीग्राही,	विष्णु.,	३१९
विचार्य तस्य वा वृत्ते,	मनु.,	३४६	विधाय प्रोषिते वृत्तिं,	मनु.,	६३१
विचार्य धर्मनिपुणैः,	नार.,	२०३	विधाय वृत्तिं भार्यायाः,	मनु.,	६११
विचार्य श्रेणिभिः, कार्यं,	बृह.,	३०	विधिः पञ्चविधस्तूक्तः,	नार.,	४९६
विचार्य सर्वं पण्यानां,	मनु.,	५१६	विधिदत्तं विषं येन,	बृह.,	२४४
विन्वित्रैश्चारयेन्वारैः	नार.,	५४६	विधिदत्तस्य दिव्यस्य,	,,	२१२
विच्छिन्नापि तु सा ज्ञेया,	कात्या.,	१७९	विधिरेव सवर्णानां,	देव.,	६६३
विज्ञाप्य नृपतिं सभ्यः,	,,	३४	विनयः कल्पनीयः स्यात्,	बृह.,	५८१
विज्ञानमुच्यते शिल्पं,	बृह.,	३८३	विनयोऽभिहितः शास्त्रे,	,,	४७५
*विज्ञायते ह्येकेन,	वसि.,	७३२	विनष्टे मूलहानिः स्यात्,	नार.,	२९४
विज्ञेयोऽसाधुसंसर्गात्,	बृह.,	५७५	विनाधारणकाद्वापि,	याज्ञ.,	३००
विट्शूद्रयोस्त्वेवमेव,	मनु.,	४८२	क्व नानार्थेऽव सन्देहे,	कात्या.,	४०
विष्मूत्रशक्ता यस्य स्यात्,	कात्या.,	३२५	विनापि मुद्रया लेख्यं,	,,	१७१
विष्मूत्रोदकचक्रं च,	,,	४५४	विनापि शीर्षकान् कुर्यात्,	याज्ञ.,	२१०
विष्मूत्रोन्मार्जनं चैव,	,,	३८७	विनापि साक्षिमिलैर्लेख्यं,	,,	१६१
वितत्येह यशो लोके,	बृह.,	१७	विनाशयन् हरन् दण्ड्यः,	बृह.,	५५७
वितथेन ब्रुवन् दर्पात्,	मनु.,	४८१	विनियोगात्स्मरक्षासु,	नार.,	६०३
विदित्वैतान् न्यायरसान्,	बृह.,	१०	विनियोगात्स्मरक्षासु,	नार.,	६०३
*विदेहायां,	पैठीन.,	८१९	विनिर्गच्छंस्तु तत्सर्वं,	,,	४११
विद्यते तत्र तेषां तु,	ब्रह्मपु.,	७३६	विनिश्चिते पूर्वपक्षे,	बृह.,	६४
विद्यमाने तु संरक्षेत्,	कात्या.,	६८५	विनिह्नुते यथाभूतं,	,,	१००
विद्यमानेऽपि रोगार्ते,	,,	३११	विनीतवेषाभरणः,	मनु.,	७
विद्यमानेऽपि लिखिते,	नार.,	१८५	विनीतवेषो नृपतिः,	कात्या.,	९
विद्यया क्रयबन्धेन,	बृह.,	१७७	विनेयः स भवेद्वाज्ञा,	नार.,	८२
विद्याकर्मयुतस्तेषां,	,,	६६४	विनेयः प्रथमेनैव,	,,	४४७
विद्यात्रयो समाख्याता,	,,	३८३	विनेयौ सुश्रुशं राज्ञा,	,,	६४०
विद्याधनं तु तत्प्राहुः,	कात्या.,	६७७	विन्देत्पतिव्रता नारी,	बृह.,	७४६
,,	,,	,,	विन्यसेत्त पदं कर्ता,	पिता.,	२२६
विद्याधनं तु तद्विद्यात्,	,,	,,	विपरीतं नयन्तस्तु,	मनु.,	४४६
विद्यापणकृतं चैव,	,,	,,	विपरीतमधर्म्यं स्यात्,	बृह.,	७०
विद्याप्रतिज्ञया लब्धं,	,,	,,	*विपरीता ब्राह्मण्यां,	हारी.,	८१८
विद्याप्राप्तं शौर्यधनं,	व्यास.,	६७५	*विपर्यये ब्राह्मण्यां,	श. लि.,	८१५
विद्याविज्ञानकर्माथं,	बृह.,	३८२	*विपर्यये,	बौधा.,	८२०
विद्याविज्ञानशौर्याथं,	,,	६६४	विपर्यये तुल्यदोषः,	नार.,	३५६
विद्याशौर्यादिनावाप्तं,	,,	६५२	विप्रः पञ्चाशतं दण्ड्यः,	मनु.,	४७८

विप्रक्षत्रियवैश्याश्च,	बृह.,	८११	विभागकाले दातव्यं,	कात्या.,	६७२
विप्रतिपत्तौ विवादे च,	कालिकापु.,	२१०	विभागदाने विपण्णे,	बृह.,	१००
विप्रत्यये परीक्ष्यं तत्,	नार.,	१६७	विभागधर्मसंदेहे,	नार.,	७५८
विप्रत्वेन तु शूद्रस्य,	याज्ञ.,	५६५	विभागनिहवे ज्ञाति,	याज्ञ.,	७५८
”	”	४८९	विभागपत्रं कुर्वन्ति,	बृह.,	१५४
विप्रपीडाकरं द्वेषं,	याज्ञ.,	४९०	विभागभावना ज्ञेया,	याज्ञ.,	७५८
विप्रः शतार्धं दण्डस्तु,	बृह.,	४७९	विभागे सति धर्मोऽपि,	नार.,	७५८
विप्रस्य त्रिषु वर्णेषु,	मनु.,	८१३	विभागोऽर्थस्य पित्र्यस्य,	”	६४८
विप्रस्योद्धारकं देयं,	”	६९७	विभावकं तत्र दिव्यं,	बृह.,	३४७
विप्राः प्राहुस्तथा चैव,	”	७३८	विभावयेत् प्रतिज्ञातं,	”	९०
विप्राक्षिपादः शूद्रायां,	देव.,	८१२	विभावितैकदेशेन,	नार.,	२६५
विप्रान्मूर्धाविक्षिप्तो हि,	याज्ञ.,	८१३	विभाव्य दापयेन्न्यासं,	बृह.,	३४६
विप्रेण क्षत्रियाजातो,	बृह.,	७०१	विभाव्य वादिनातत्र,	कात्या.,	३०५
विप्रो धर्मदुमस्यादिः,	”	१०	विभाव्यो वादिना यादृक्,	”	१०६
विप्लुतौ शूद्रवह्ण्डयौ,	मनु.,	५९१	विमिन्नैर्नैककार्यं च,	”	१३७
विब्रुवंश्च भवेदेवं,	कात्या.,	८२	विमोक्षस्तु यतस्तस्मात्,	”	३१३
विभक्तजस्य तत्सर्वं,	बृह.,	७०५	विरुद्धं नियतं प्राहुः,	”	२६१
विभक्ताः सह जीवन्तो,	मनु.,	७५४	विरुद्धं न्यायतो यत्तु,	”	२६२
*विभक्तादायादानपि,	बौधा.,	७५१	विरुद्धश्चाविरुद्धश्च,	बृह-यम.,	५०
विभक्तानवगच्छेयुः,	नार.,	७५८	विरुद्धा वर्जिताः स्युः,	कात्या.,	११३
विभक्तानां पृथग्ज्ञेयाः,	नार.,	७५८	विरूपं रूपवन्तं वा,	मनु.,	६०४
विभक्ता भ्रातरः कुर्युः,	नार.,	३०३, ७५८	विलिखत्यवनि पङ्क्त्यां,	नार.,	१४०
विभक्ता भ्रातरो ये च,	बृह.,	७५५	विवशः शतमाजातीः,	मनु.,	१२५
विभक्ताऽविभक्ता वा,	”	३७६	विवादं संप्रवक्ष्यामि,	”	४१३
विभक्ता ह्यविभक्ता वा,	नार.,	३०९	विवादकारणान्यस्य,	बृह.,	२७७
”	बृह.,	७६०	विवादयेत् सद्य एव,	याज्ञ.,	६६
विभक्तेनैव यत्प्राप्तं,	कात्या.,	६९५	विवादाद्विगुणं दण्डं,	”	१४२
विभक्तेषु सुतो जातः,	याज्ञ.,	७०६	विवादानुमतं पृष्ट्वा,	व्यास.,	२५
विभक्तो यः पुनः पित्रा,	बृह.,	७५७	विवादिनो नराश्चान्यान्,	बृह.,	७८०
*विमजिष्यमाणम्,	हारी.,	७११	विवादे पृच्छति प्रश्नं,	”	२७
विमजेरन् धनं तस्य,	श.,	७५६	विवादे साक्षिणस्तत्र,	नार.,	८८
विमजेरन् सुताः पित्रोः,	याज्ञ.,	६६२	विवादोऽष्टादशोपेतः,	बृह.,	७७१
*विमज्यमाने दायार्थे,	श. लि.,	६७१	विवास्या वा भवेद्वाष्ट्रात्,	मनु.,	७८५
विमज्यमानो गवां समूहे,	हारी.,	६५७	विवाहकाले यत्स्त्रीभ्यो,	कात्या.,	६९४
विमज्य सह वा कुर्युः,	कात्या.,	६१६	विवाहात्परतो यत्तु,	कात्या.,	६९४
विभागं चेत् पिता कुर्यात्,	याज्ञ.,	६५४	विवाहादिविधिः स्त्रीणां,	नार.,	६०१
विभागकाले तत्तस्य,	व्यास.,	६७५	विवाह्यश्रोत्रिमिर्युक्तं,	बृह.,	१८६

विविक्ते ताडितो यस्तु,  
विविधस्यास्य लेख्यस्य,  
विविधान्नरकान्याति,  
विवीतनगराभ्याशो,  
विवीतभर्तुस्तु पथि,  
विवीते स्वामिना देयं,  
विवृध्यर्थं स्ववंशस्य,  
विशस्तथार्धपञ्चाशत्,  
विशालमुच्छ्रितां शुद्धां,  
विशीलः कामदत्तो,  
विशुद्धं तमिति ज्ञात्वा,  
विशुद्धिर्दण्डभाक्त्वं च,  
विशेषश्चापि पुत्राणां,  
विशेषतः स्थावराणां,  
विशेषतो गृहक्षेत्र,  
विशेषतोऽप्रसूतायाः,  
विशेषलिखितं ज्याय,  
विशेषश्चेज्ज दृश्येत,  
विशोधिते क्रये राज्ञा,  
विश्रम्भहेतू द्वावत्र,  
विश्वस्तवञ्चकाश्चैव,

”

विश्वासं प्रथमं कृत्वा,  
विषं वेगक्रमापेतं,  
विषं सहस्रेऽपहृते,  
विषत्वं ब्रह्मणः पुत्रः,

”

विषत्वं ब्रह्मणा सृष्टः,  
विषत्वाद्विषमत्वाच्च,  
विषमस्थाश्च ते सर्वे,  
विषमस्थाश्च नासेध्याः,

”

विषमान्नपतिः कुर्यात्,  
विषमे भूपदेशे च,  
विषमेषु च सज्जन्यः,  
विषवर्जं ब्राह्मणस्य,  
विषवेगह्णमातीतः,

बृह., ४९५  
बृह., १६६  
हारी., ३७७  
बृह., ३६९  
याज्ञ., ५५२  
कात्या., ५५३  
मनु., ७२६  
बृह., ४७९  
पिता., २१६  
मनु., ६२७  
विष्णु., २४४  
नार., ४९६  
देव., ७१५  
नार., १८५  
नार., २७३  
” ६४२  
कात्या., ३०२  
नार., ४९७  
कात्या., ३५४  
नार., २७८  
बृह., ३९  
” ५२१  
” ४२०  
विष्णु., २४४  
बृह., १९९  
नार., २४३  
याज्ञ., ”  
पिता., २४२  
विष्णु., २४२  
कात्या., ५३  
बृह., ५४, ५५  
नार., ५५  
कात्या., ४५२  
पिता., २३४  
मनु., ६०१  
नार., २०४  
” २४३

विषामिदं स्त्रियं चैव,  
विषोद्धन्धनशस्त्रेण,  
विसंवदेद्व्यमपि,  
विसंवदेन्नरो लोभात्,  
विसंवादोऽथ शीलस्य,  
विसर्जनं हि तत्तस्य,  
विस्फोटयैस्तथा दोषैः,  
विस्त्रम्भैः सर्वशङ्कासु,  
विस्रब्धं ब्राह्मणः शूद्रात्,  
विहङ्गमहिषीणां च,  
विहाय करणं पूर्वं,  
विहाय चरिताचारं,  
विहायोपानं दुष्णीषं,  
विहिताकरणान्नित्यं,  
वृक्षपर्वतमारूढा,  
वृत्तदेशकुलानां च,  
\*वृत्तस्थस्य,  
वृत्तस्वाध्यायवांस्तेयी,  
\*वृत्तिमूलो,  
वृत्तिराभरणं शुल्कं,  
वृत्ते वादे पुनर्न्यायः,  
वृथा तदन्तरं ते स्यात्,  
वृथा दानाक्षिकपणां,  
वृद्धा वा यदि वाऽवृद्धाः,  
वृद्धिः दद्युः सर्वे वर्णाः,  
वृद्धिः सा कारिता नाम,  
वृद्धिरष्टगुणा ह्येषा,  
वृद्धिस्तु योक्ता धान्यानां,  
वृद्धिश्चतुर्विधा प्रोक्ता,  
वृद्धे जनपदे राज्ञी,  
\*वृद्धे विपरीत,  
वृद्धेरपि पुनर्वृद्धिः,  
वृषल्लुपशूनां च,  
वृषलं तं विदुर्देवाः,  
वृषलं सेवते या तु,  
वृषलत्वं गता लोके,  
वृषो हि भगवान् धर्मः,

याज्ञ., ५६७  
बृह., ८०५  
व्यास., १०६  
मनु., ४२४  
कात्या., ३०९  
मनु., ३८९  
कालिकापु., २५२  
पिता., २०९  
मनु., ३९३  
” ७३९  
बृह., ७७१  
” २६२  
” १३६  
” २१  
कात्या., ७३  
” ४७२  
” ८०२  
बृह., ५४०  
श. लि., ८००  
देव., ६९३  
बृह., ५९  
नार., १३५  
” २९०  
कात्या., ४४८  
विष्णु., २८७  
नार., २८३  
कात्या., २९०  
नार., २८७  
बृह., २८२  
नार., ४६०  
श. लि., ६६१  
नार., २८३  
याज्ञ., ५६१  
मनु., ३७  
यम., ५९२  
मनु., ८२८  
मनु., ३७

*वेणानां लङ्घन,	श. लि., ८३०	वैश्यश्चेत् क्षत्रियां गुप्तां,	मनु., ५८८
वेणुकाण्डमयांश्चैव,	कात्या., २३४	वैश्यस्य च जलं देयं,	कालिकापु., २०५
वेणुवेणवभाण्डानां	मनु., ५३५	वैश्यस्तु क्षत्रियाक्रोशे,	बृह., ४७९
”	नार., ५३६	वैश्यस्य वर्णं चैकरिभन्,	मनु., ८१३
वेतनस्यानपाकर्म,	नार., ४२, ४००	वैश्यस्य वार्धपञ्चाशत् .	” ४७८
”	बृह., ३८२	*वैश्यस्य वैश्यः,	विष्णु., ७००
वेतनस्यैव चादानं,	मनु., ४३	वैश्यस्य सलिलं देयं,	नार., २०४
वेदविद्याविदो विप्रान्,	बृह., ४१९	वैश्यस्य चैतद्विगुणं,	बृह., ४७९
वेदादिमिरिदं प्रोक्तं,	नार., २२८	वैश्याच्छूद्रस्य कन्यायां,	देव., ८१२
वेलां प्रदेशं विषयं,	कात्या., ६०	*वैश्याच्छूद्रायां,	बौधा., ८१४
वेश्याः प्रधाना यास्तत्र,	नार., ४१०	वैश्याजोऽध्यर्धमेवांशं,	” ६९७
वेश्यागामी द्विजो दण्ड्यो,	मत्स्यपु., ६००	*वैश्याक्षत्रियायाम्,	बौधा., ८१८
वैकृतं यस्य दृश्येत,	पिता., २४७	वैश्यात्तु करणः शूद्रायां,	याज्ञ., ८१४
वैगुण्याजन्मत पूर्वः,	मनु., ८२४	वैश्यात्तु जायते ब्राह्म्यात्,	मनु., ८२६
*वैदेहकवन्दि,	पैठीन., ८१९	वैश्यापुत्रास्तु भागांस्त्रीन्,	महाभा., ६९८
वैदेहकादन्धमेदौ,	मनु.विष्णु., ८२२	वैश्यापुत्रस्तथाम्बष्ठ,	नार., ८१६
वैदेहकादम्बष्ठ्यायां	बौधा., ८१९	वैश्यापुत्रात्तयाम्बष्ठ,	नार., ८१६
*वैदेहकानां पत्र,	शङ्खलि., ८३०	वैश्यापुत्रेण कर्तव्याः,	महाभा., ६३८
वैदेहकानां स्त्रीकार्यं,	मनु., ८२९	वैश्यापुत्रेण हर्तव्याः,	महाभा., ६९८
*वैदेहकायाम्,	शङ्खलि., ८१९	वैश्यापुत्रो हरेद्वयंशं,	मनु., ६९७
वैदेहकायामम्बष्ठात्,	देव., ८२०	वैश्या प्रसूता चत्वारि,	नार., ६४२
वैदेहकेन त्वम्बष्ठ्यां,	देव., ८२०	*वैश्यायाम्,	उश., ८१४
वैदेहकेन त्वम्बष्ठ्यां,	मनु.-विष्णु., ८२०	”	पैठी., ८१९
वैद्यो वैद्याय नाकामो,	नार., ६७५	”	वसि., ८१७
वैरूप्यं मरणं वापि,	याज्ञ., ६१०	”	वसिष्ठ., ८१७
वैवाहिकं तु तद्विद्यात्,	कात्या., ६७८	वैश्यायां क्षत्रियाज्जातः,	देव., ८१२
वैवाहिके क्रमायाते,	बृह., ३७५	वैश्यायां क्षत्रियायां च,	देव., ८१७
वेशोऽप्यात्प्रकृति श्रेष्ठ्यात्,	मनु., ८११	वैश्यायां ब्राह्मणाज्जातः,	देव., ८१२
वैश्यं पञ्चाशतं कुर्यात्,	” ५९१	*वैश्यायां मागधः,	पैठी., ८१८
वैश्यं वा धर्मशास्त्रज्ञं,	कात्या., २८	*वैश्यायां शूद्रः,	हारीत., ८१८
वैश्यं वा क्षत्रियं वापि,	यम., ५९३	*वैश्यायामम्बष्ठ,	उश., ८१४
वैश्यः सर्वस्वद्रण्यः स्तात्,	मनु., ५९१	*वैश्यायामायोगवः,	पैठीन., ८१९
वैश्यमक्षारयन् शूद्रो,	बृह., ४७९	”	शङ्खलि., ८१५
*वैश्यवर्जमष्टधा,	विष्णु., ६९९	वैश्यायामेव शूद्रेण,	यम., ८१८
वैश्यवृत्त्यपि तं चैव,	कात्या., ३३९	वैश्याशूद्रयोस्तु राजन्यात्,	याज्ञ., ८१४
वैश्यशूद्रो प्रयत्नेन,	मनु., ७७६	*वैश्येन,	पैठी., ८१९
*वैश्यश्चतुर्थमंशं,	विष्णु., ७९२	वैश्येन ब्राह्मण्याम्,	वसि., ८१५

*वैश्येन शूद्रायां,	श. लिं.	८१४
*वैश्योऽर्धशतं द्वे वा,	मनु-नार.,	४७८
बोढव्यं तद्भवेत्तेन,	नार.,	५४५
बोढुः स गर्भो भवति,	मनु.,	७३०
बोढुमर्हति गोपस्तां,	नार.,	४१६
व्यक्तं हि नरके घोरे,	रामा.,	१७
व्यङ्गैक श्रोत्रियाचार,	नार.,	१०९
व्यत्यये कर्मणां साम्यं,	याज्ञ.,	८२५
व्यत्यास परिहासाच्च,	कात्या.,	३७९
व्यपैति गौरवं यत्र,	कात्या.,	६७
व्यभिचारं सदार्येषु,	बृह-कात्या.,	२१२
व्यभिचाररता या च,	कात्या.,	६८७
व्यभिचारानु भर्तुः स्त्री,	मनु.,	६३०
व्यभिचारादतौः शुद्धिः,	याज्ञ.,	६१८
व्यभिचारे स्त्रियो मौण्ड्यं,	नार.,	६१९
व्ययं दद्यात्कर्म कुर्यात्,	बृह.,	३५९
व्यवहारः कृतोऽप्येषु,	नार.,	२७०
व्यवहारः स विज्ञेयो,	बृह.,	२६१
व्यवहारधुरं बोढुं,	नार.,	२७
व्यवहारश्चरित्रेण,	कात्या.,	२६२
व्यवहारान् दिदृक्षुस्तु,	मनु.,	७
व्यवहारान् नृपः पश्येत्,	याज्ञ.,	८
व्यवहारान् स्वयं दृष्ट्वा,	व्यास.,	२६६
व्यवहारान् स्वयं पश्येत्,	याज्ञ.,	७९६
व्यवहारामिशस्तोऽयं,	नार.,	२२१
,, विष्णु.,	२२०, २२९, २३७, २४३	
व्यवहारेषु विज्ञेयो,	नार.,	३७३
व्यवहारो मिथस्तेषां,	मनु.,	८३२
व्यवहारो द्वि बलवान्,	नारद.,	१४
व्यवाये तीर्थगमने,	वसि.,	६१७
व्यसनं जायते घोरः,	याज्ञ.,	२४८
व्यसनामिच्छते पुत्रे,	कात्या.,	३२१
व्याख्यागम्यमसारं च,	,,	७१
व्याख्यातस्त्वधुना सम्यक्,	बृह.,	७७१
व्याघातेषु नृपाज्ञायाः,	कात्या.,	११७
व्याघ्रादिभिर्हतो वापि,	नार.,	४५८
*व्याधता पुलकसानाम्,	विष्णु.,	८३१

व्याधान् शाकुनिकान् गोपान्,	मनु.,	४४४
व्याधितं व्यसनस्थं च,	कात्या.,	६८६
व्यधिता सश्रमा व्यग्रा,	बृह.,	४०८
व्याधितोन्मत्तवृद्धानां,	कात्या.,	३११
व्याधिना प्रेतकाले तु,	,,	६८७
व्यापादने तु तत्कारी,	,,	५७१
व्यापादो विषशस्त्राद्यैः,	नार.,	५५७
व्याप्नोति पादशो यस्मात्,	नार.,	४१
व्यायच्छेच्छक्तिः क्रोशेत्,	बृह.,	४१५
व्यालग्राहानुच्छृत्तीन्,	मनु.,	४४४
व्यालग्राहान् शाकुनिकान्,	मनु.,	४४४
व्यालग्राही यथा व्यालं,	अङ्गी.,	६३३
व्यालग्राही यथा सर्पं,	व्यास.,	६३४
व्यासिद्धं राजयोग्यं च यत्,	याज्ञ.,	५१६
व्रतहीना असंस्काराः,	देव.,	८२७
व्रतोपवासनिरताः,	बृह.,	६३६
व्रात्यया सह संवासे,	मनु.,	५८९
व्रात्यात्तु जायते विप्रात्,	मनु.,	८२६
व्रीहीनतिप्रयत्नेन,	नार.,	२३२

## श

शंशर्भी तदभावे तु,	नार.,	२१४
शक्तं कर्मण्यदुष्टं च,	मनु.,	३६८
शक्तस्य संज्ञिधावर्थो,	कात्या.,	१७०
शक्ताश्च य उपेक्षन्ते,	नार.,	५४९
शक्तितत्त्वानुमान्यैनं,	नार.,	३८५
शक्तितो नामिधावन्तो,	मनु.,	५५०
शक्तिभक्त्यनुरूपा स्यात्,	बृह.,	३८६
शक्तो ह्यसोक्षयन् स्वामी,	याज्ञ.,	४९५
शक्त्यपेक्ष्यं ऋणं दाप्यः,	नार.,	३२७
शङ्का त्वसज्जनैकाध्यात्,	,,	५४३
शङ्काभियोगस्तथ्यं वै,	बृह.,	५९
शङ्काविश्वाससंधाने,	कात्या.,	२०९
शङ्का सतां तु संसर्गात्,	नार.,	४१
शतं ब्राह्मणमाकुश्य,	मनु-नार.,	४७८
शतमश्वानृते हन्ति,	बौधा.,	१२९
,,	मनु-नार.,	१३३
शतमष्टपलं ज्ञेयं,	नार.,	५२४

शतानि पञ्च च परो,	नार.,	८०६	शस्त्रावपाते मर्मस्य,	याज्ञ.,	५७१
शतानि पञ्च दण्ड्यः स्यात्,	मनु.,	४५६	शस्त्रोद्यताद्यास्तु तथा,	बृह.,	५६
" "	"	५८८	शाकानामर्द्रमूलानां,	नार.,	५३६
" "	"	५८९	शारङ्गी मन्दपालेन,	मनु.,	६०९
शते दशपलावृद्धिः,	याज्ञ.,	५२५	शारीरं धनसंयुक्तं,	"	७८४
शते विषं तु पादोने,	कात्या.,	२०२	"	यम.,	७८२
शते हृतेऽपह्नते च,	बृह.,	१९९	शारीरश्चार्थदण्डश्च,	नार.,	७९८
शत्रुश्रोत्रियराज्ञां तु,	कात्या.,	१९१	शारीरस्त्वनवरोधादिः,	"	७९४
शत्यस्ततोऽधिकः पाद,	याज्ञ.,	४७७	शारीरो द्विविधः प्रोक्तो,	"	७९८
शनकैस्तु क्रियालोपात्,	मनु.,	८२८	शाङ्गं हैमवतं शस्तं,	"	२४१
शनैर् भैत्स्यन्ति चाक्रम्य,	नार.,	१३४	शालीनत्वाद्भयार्तो वा,	बृह.,	६४
शपथान्वा प्रयुज्जीयात्,	बृह.,	१९३	शाल्मलीसालतालांश्च,	मनु.,	४३९
शपथार्थौ हिरण्याग्नी,	"	२७	शाल्मले फलके श्लक्ष्णे,	"	५२६
शपथा ह्यपि देवानां,	नार.,	२५५	शास्त्रं केवलमाश्रित्य,	बृह.,	२६१
*शपथेनैके सत्यकर्म,	गौत.,	१३०	शास्त्रदृष्टेन मार्गेण,	कात्या.,	१०
शपथैः शापिताः स्वैः स्वैः,	बृह.,	४४५	शास्त्रवद्यत्नतो रक्ष्या,	"	२३
शपथैः स विशोद्धव्यः,	"	५७५	"	बृह.,	२२
शपथैः स विशोद्धयः स्यात्,	"	३६०	शास्त्रविद्विष्यथा प्रोक्तं,	नार.,	२४५
शपन्तं दापयेद्राजा,	याज्ञ.,	४७६	शास्त्रशौर्यार्थरहितः,	बृह.,	६६६
शब्दामिधानतत्त्वज्ञो,	बृह.,	२९	शास्त्रसम्भ्यविरोधेन,	"	२६०
शम्यापातास्त्रयो वापि,	मनु.,	४६२	*शास्त्रैरधिगतानां,	आप.,	७७७
शय्यासनमलङ्कारं,	"	६०४	शास्त्रोदितेन विधिना,	बृह.,	३४
शय्यासने विविक्ते तु,	व्यास.,	५७९	"	"	१९८
शरः प्रक्षेपणस्थानात्,	पिता-नार.,	२३८	शास्त्रोद्वाहोद्यतो रोगी,	बृह.,	५४
शरकुञ्जकवल्मीका,	व्यास.,	४४९	शास्यो भवेत्तदा दण्ड्यो,	कात्या.,	५४
शरद्विष्मवसन्तेषु,	नार.,	२४०	शिक्ष्यद्वयं समासज्य,	पिता.,	२१७
शरद्विष्मेषु तु सलिलं,	पिता.,	२०३	शिक्ष्यद्वयं समासाद्य,	नार.,	२१६
शरांस्तानायसैरग्नैः,	कात्या.,	२९४	शिक्ष्यच्छेदे तुलाभङ्गे,	कात्या.,	२२३
शराणां पतनं ग्राह्यं,	पिता.,	२३५	शिक्षकाभिज्ञकुशला,	"	३७१
शरान् कुञ्जगुल्मांश्च,	मनु.,	४४०	शिक्षयन्तमदुष्टं च,	नार.,	३८४
शरान् संपूजयद्भक्त्या,	पिता.,	२३४	शिक्षितोऽपि कृतं कालं,	"	३८४
शरीरार्धं स्मृता जात्या,	बृह.,	७४६	शिखावृद्धिं कायिकां च,	बृह.,	२८५
शरीरार्धं स्मृता नारी,	"	६३५	शिखेव वर्धते नित्यं,	"	२८५
शरीरेण समं नाशं,	मनु.,	३७	शिफाविदलरज्ज्वाद्यैः,	मनु.,	८०२
शल्यं नास्य निवृन्तन्ति,	मनु-नार.,	३६	शिरसो मुण्डनं तस्याः,	यम.,	५९३
*शस्त्र पाणिघातको,	श. लि.,	१९५	शिरसो मुण्डनं दण्डं,	"	७८६
*शस्त्राणि चायुधो,	"	८००	शिरसो मुण्डनं दण्डः,	नार.,	५७९



शिरस्थायि विहीनानि,	पिता., २१०	शुल्कं च त्रिगुणं दद्यात्,	मनु., ५९७
शिरस्थोऽपि विहीनानि,	पिता., २१०	शुल्कं दद्यात्सेवमानः,	,, ५९५
शिरोहीनं भवेद्विष्यं,	कालिकापु., २११	शुल्कं सोऽष्टगुणं दाप्यो,	नार., ४०९
शिरोभिस्ते गृहीत्वोर्वी,	मनु., ४४५	*शुल्कगुल्माधिकृतो,	श. लि., ११४
शिरोमात्रं तु दृश्येत,	कात्या., २३९	शुल्कस्थानं परिहरन्,	मनु., ५१४
शिरोरुग्भुजभङ्गश्च,	,, २४८	शुल्कस्थानं वणिक् प्राप्तः,	नार., ५१४
*शिल्पिनः कारवः,	श. लि., ८०७	शुल्कस्थानादपाकामन्,	विष्णु., ५१५
शिल्पिनश्चापि तत्काले,	नार., ५४	शुल्कस्थानेषु कुशलाः,	मनु., ५१८
शिल्पिषूपनिधौ न्यासे,	,, ३४७	शुश्रूषकः पञ्चविधः,	नार., ३८२
शिल्पिष्वपि हि धर्मोऽयं,	कात्या., ६७७	*शूद्रं कटाग्निना दहेत्,	बौधा., ५९०
शिल्पोपचारयुक्ताश्च,	मनु., ५०८	शूद्रं तु कारयेद्दास्यं,	मनु., ३९८
शिल्पोपजीविनो ये तु,	कात्या., ८१०	शूद्रं तु घातयेद्वाजा,	यम., ५९०
शिरस्योत्कर्तनं तत्र,	नार., ५८७	शूद्रं तु तण्डुला देया,	पिता., २५०
*शिष्यशिष्टिरवधेन,	गौत., ४९५	शूद्रप्रव्रजितानां च,	याज्ञ., ५६१
शिष्यादार्तिविज्यतः प्रश्नात्,	कात्या., ६७७	शूद्रविद्वत्क्षत्रजातीनां,	बृह., ३६२
शिष्यान्तेवासिमृतकाः,	नार., ३८३	शूद्रविद्वत्क्षत्रविप्राणां,	मनु., १४६
शिष्येन बन्धुना वापि,	मनु., ११७	*शूद्रश्चेद्ब्राह्मणीमभिगच्छेत्,	वसि., ५९२
शीलाध्ययनसंपन्नः,	कात्या., ३९६	शूद्रस्तथान्य एव स्यात्,	याज्ञ., ५८९
शुक्तिशृङ्गाकृतिर्भङ्गे,	,, २४१	*शूद्रस्त्ववाप्तं,	विष्णु., ७९३
*शुकशोणितसंभवः,	वसि., ३७५	शूद्रस्य तु सवर्णैव,	मनु., ७००
शुचयो वेदधर्मज्ञा,	बृह., ४२०	*शूद्रस्य शूद्र,	विष्णु., ७००
शुचिक्रियश्च धर्मज्ञः,	व्यास., १०३	*शूद्रस्यैव वापि शय्यासन,	आप., ४९२
शुचिना सत्यसन्धेन,	मनु., ७९४	शूद्राक्रोशे क्षत्रियस्य,	बृह., ४७९
शुच्याचारा भर्तृमना,	हारी., ६२८	शूद्राज्जातो निषाद्यां तु,	मनु-विष्णु., ८२०
शुद्धनिष्ठीवनाच्छुद्धो,	कात्या., २५१	शूद्राज्जायेत चण्डालो,	यम., ८१८
शुद्धचेदतिकारण्यात्,	कालिकापु., २३८	शूद्राणां तु सधर्माणः,	मनु., ८२४
शुद्धश्चेद्गमयोर्ध्वं च,	,, २२१	शूद्राणां दासवृत्तीनां,	ब्रह्मपु., ७३६
शुद्धश्चेद्गमयोर्ध्वं मां,	याज्ञ., २१८	शूद्रादायोगवक्षत्,	देव., ८१७
शुद्धर्णशङ्कया तनु,	बृह., १७४	*शूद्राद्वैश्यायां,	बौधा., ८१८
शुद्धार्थवाक्यायशुद्धः,	कात्या., १३८	*शूद्रान्निषाद्यां,	,, ८१९
शुद्धिश्च तेषां धर्मात्,	नार., ३४	शूद्रा पारशवं सूते,	नार., ८१६
शुद्धेषु व्यवहारेषु,	,, ३४	*शूद्रापुत्र,	गौत., ७०४
शुद्धेस्तु संशये चैव,	कात्या., २२३	*शूद्रापुत्र एव,	वसि., ७३४
शुद्धेस्त्वं कारणं प्रोक्तं,	पिता., २३७	शूद्रापुत्रवत्प्रतिलोमासु,	गौत., ६६९
शुद्धो भवति धर्मेण,	पिता-बृह., २५२	शूद्रापुत्रस्त्वेकं,	विष्णु., ६९९
शुभकर्मकरा ह्येते,	नार., ३८६	शूद्रापुत्रस्त्वेकं,	,, ,
शुल्कं गृहीत्वा पण्यस्त्री,	,, ४०८	शूद्रापुत्राः स्वयं दत्ताः,	हारी., ७१८

*शूद्राणामुत्थानप,	गौत.,	७०४	शोधयित्वा ऋणिकुले,	बृह.,	२९९
शूद्रायां करणो वैश्याम्,	याज्ञ.,	८१३	शोधयेत् पूर्वपादं तु,	नार.,	६३
शूद्रायां चतुर्विधोः,	मनु.,	५८८	शोधयेन्न नरः पापात्,	नार.,	२४३
शूद्रायां चतुर्विधज्जातं,	देव.,	८१२	*शोधयस्य जननी तातः,	वादिभयंकर.,	२४८
शूद्रायां चतुर्विधस्तद्वत्,	नार.,	८१६	शोषमागच्छतश्चोष्ठौ,	नार.,	१४०
*शूद्रायां निषेधेन,	श. लि.,	८१९	शौचाभिकार्यं संयोज्या,	बृह.,	६०८
*शूद्रायां पारशवं,	उशना.,	८१४	शौचे धर्मेऽनपत्तयां च,	मनु.,	६०८
शूद्रायां ब्राह्मणाज्जातः,	मनु.,	८२५	शौण्डिकव्याधरजक,	बृह-कात्या.,	३१७
*शूद्रायामुग्रः,	बौध्वा.,	८१४	शौण्डिकायां ब्राह्मणस्तु,	बृह.,	३२६
शूद्राश्च सन्तः शूद्राणां,	मनु-कात्या.,	१०७	शौर्यप्राप्तं तु यद्वित्तं,	कात्या.,	६८१
शूद्रेण जायते श्लोमः,	यम.,	८१८	शौर्यभार्याधने हित्वा,	नार.,	६७६
शूद्रेण ब्राह्मणः,	श. लि.,	८१५	शौर्यादिनाप्नोति धनं,	व्यास.,	६८३
शूद्रोऽपि,	वसि.,	८१७	शौलिकैः स्थानपालैर्वा,	याज्ञ.,	५५४
शूद्रोऽपि,	पैदीन.,	८१९	रमशानगोचरं सूते,	मनु-विष्णु.,	८२२
शूद्रो गुप्तमणुसत्वा,	मनु.,	५९०	*रमशानमृतपरिच्छादो,	हारी.,	८३१
शूद्रो दासः पारशवो,	ब्रह्मपु.,	७३६	अद्वानुग्रहसंप्रीत्या,	बृह.,	३५७
*शूद्रो द्विजातीनमिंसंधाय,	गौत.,	४८०	श्रवणाच्छ्रावणाद्वापि,	व्यास.,	१००
शूद्रो ब्राह्मण्यं भयेति,	मनु.,	८२५	श्राद्धादि दासवत्सर्वे,	ब्रह्मपु.,	७३६
शूद्रायां द्विजातिमिर्जातो,	बृह.,	७०२	श्रान्तान् क्षुधातान् तृषितान्,	कात्या-बृह.,	५००
शूद्रानि चाप्यगाराणि,	मनु.,	५४५	श्रावयन्त्यर्थलोमेन,	बृह.,	५२२
शूद्रोऽशांश्चैव समर्थो,	कात्या.,	३७२	श्रावयित्वा तथान्येभ्यः,	नार.,	१४०
शूलेमत्स्यानिवापद्यन्,	मनु.,	७९५	श्रावयेत् स्मारयेच्चैव,	बृह.,	१७०
शूलं तममौ विपचेत्,	नार.,	४९०	श्रावितेनान्तरेणापि,	नार.,	११५
शृगालयोनिं प्राप्नोति,	मनु.,	६३०	श्राव्यमाणोऽर्थिना यत्र,	कात्या.,	१९४
शृङ्गिणो वस्त्रनामस्य,	पिता.,	२४१	श्रिय एता स्त्रियो नाम,	महाभा.,	६१०
शृणोति यदि नो राजा,	कात्या.,	३४	श्रियः स्त्रियश्च गेहेषु,	मनु.,	६०९
शृण्विभं मानवं धर्मं,	नार.,	२३७	श्रुतं च लिखितं चैव,	कात्या.,	७३
शेषोऽपि शपथमव्यभ्रं,	मनु.,	२५५	श्रुतं देशं च जातिं च,	मनु.,	४८१
शेषाणामानुशस्यार्थम्,	मनु.,	७०८	*श्रुतदेशजातिकर्मणां	विष्णु.,	४८१
शेषाश्चेदनुतं ब्रूयुः,	नार.,	४४६	श्रुताभियोगं प्रत्यर्थी,	बृह.,	६९
शेषास्तमुपजीवेयुः,	मनु.,	६४९	श्रुति विद्योपसंपन्ने,	मनु.,	७८७
शेषेभ्योकादशगुणं,	मनु.,	५३२	श्रुतिस्मृतिविरुद्धं च,	यम.,	११
शेषेभ्योकादशगुणं,	मनु.,	५३३	श्रुतिस्मृत्यविरोधेन,	कात्या.,	२०
शौचं नित्यं ज्ञातव्यं यत्,	मनु.,	६१०	श्रुत्वा कालं देशाकार्यौ,	बृह.,	१६६
शौचितं दृश्यते धस्य,	बृह-पिता.,	२५१	श्रुत्वा पूर्वोत्तरं सभ्यैः,	मनु.,	९०
शौचितं यत् दृश्येत,	बृह.,	४९५	श्रुत्वार्थस्योत्तरं लेख्यं,	याज्ञ.,	६८
*शौचितं शुद्धं भवः,	वसि.,	७३१	श्रुत्वा लेखयतो ह्यर्थं,	कात्या.,	६४

श्रूयतां कर्षकादीनां,	बृह.,	३६९
श्रेणिनैगमपाखण्ड,	याज्ञ.,	४२१
श्रेणीपूगनृपद्विष्टः,	बृह.,	४२५
श्रेणीषु श्रेणिपुरुषाः,	नार.,	१०६
श्रेण्यादिषु तु वर्गेषु,	,,	१११
*श्रेयसः शयनशायिनं राजा,	हारी.,	५९१
श्रेयसः श्रेयसोऽलाभे,	श. लि.,	७१७
श्रेत्रियः श्रेत्रियं साधुं,	मनु.,	५६२
श्रेत्रियास्तापसा बृद्धा,	नार.,	१०८
श्रेत्रियाया वचनतः,	नार.,	१०८
*श्रेत्रियो गुणवान्,	श. लि.,	१०६
*श्वः श्वः पचन भाण्डानाम्,	श. लि.,	६२१
*श्वपचानां चैवम्,	,,	८३३
श्वपाकपशुचाण्डाल,	नार.,	४९८
*श्वमिः खादयेद्राजा,	गौत.,	४९१
श्वशूः पूर्वजपत्नी च,	बृह.,	६९३
श्वश्वादिभिर्गुरुस्त्रीभिः,	,,	६०३
श्वित्र्यन्धकुनखीनां च,	नार.,	२०५

ष

षट्सु वा,	गौत.,	७८३
षट्सु षट्सु च मासेषु,	मनु.,	५१७
षडाब्दिके विराटं तु,	कात्या.,	६५
षड्गुणः कायमध्ये तु,	,,	४८६
*षड्दायादेषु,	विष्णु-श.लि.,	७१२
*षड्बन्धुदायादाः,	हारी.,	७१३
षड्भागं तल मूल्यस्य,	कात्या.,	४३५
षड्भागकरणं शुल्कं,	बृह.,	७७४
षड्भागकरशुल्कं च,	,,	४७
*षड्भिः परिद्वार्यो,	गौत.,	७८३
षड्विधस्तस्य विबुधैः,	नार.,	४९२
षड्विधान्यैः समाख्याता,	बृह.,	२८२
षड्विधा बन्धुदायादाः,	श. लि.,	७१२
षड्हस्तं तु तयोः प्रोक्तं,	नार.,	२१५
षष्ट्या नाशे जलं ज्ञेयं,	कात्या.,	२०२
षष्ठं च तण्डुलाः प्रोक्तं,	बृह.,	१९८
षष्ठं तु क्षेत्रजस्यांशं,	मनु.,	७१०
षाण्मासिकं मासिकं वा,	बृह.,	४२७

षाण्मासिकेऽपि समये,	,,	१५२
षोडशाथः पणान् दाप्यो,	याज्ञ.,	५५९
षोडशैव तु वैश्यस्य,	मनु.,	५५१

स

संकरे जातयस्त्वेताः,	मनु-विष्णु.,	८२२
संकामयेत्तथान्यत्र,	कात्या.,	३९८
संकीर्णयोनयो ये तु,	मनु-विष्णु.,	८२०
संक्रमध्वजयष्टीनां,	मनु.,	५६५
संग्रामचौरमेवी च,	बृह.,	७७४
संग्रामादाहतं यत्तु,	कात्या.,	६७८
संजानन्नात्मनो लेख्यं,	नार.,	१०३
संतानकादिषु तथा,	बृह.,	४२७
संतोत्य कारयेदेवं,	कालिपु.,	२२१
संतोत्य कारयेदेव,	विष्णु.,	२२७
संदेशेन नियुक्ता वा,	पिता.,	२३०
संदिग्धं यत्र साक्ष्यं तु,	कात्या.,	१४५
संदिग्धार्थं स्वतन्त्रो यः,	याज्ञ.,	८२
संदिग्धेऽर्थे वक्ष्यन्ार्था,	बृह.,	३५९
संदिग्धे प्रातिभाव्ये च,	संवर्तः.,	२९१
संदिष्टस्य प्रदाता च,	याज्ञ.,	५६०
संदेहे चोत्पत्ते,	वसि.,	७३२
संपश्यतः सभृत्यश्च,	मनु.,	५११
संप्रति स्थावरे प्राप्ते,	बृह.,	१७७
संप्रधार्याब्रवीद्धाता,	मनु.,	८२६
संप्राप्तो यातनास्थानं,	व्यास.,	६३४
संप्रीत्या भुज्यमानानि,	मनु.,	१९१
संप्रीत्या साधनीयास्ते,	बृह.,	६९६
संभवे साक्षिणां चैव,	नार-बृह.,	९२
संभाषणं गृहे स्त्रीभिः,	मनु.,	५८२
संभाषणं च रहसि,	बृह.,	५७८
संभूतेऽर्थे य आसिद्धः,	कात्या.,	५४
संभूय कुर्वतामर्थं,	याज्ञ.,	५१६
संभूय कुर्वतामेष्ट,	बृह.,	३७१
संभूय च समुत्थानं,	मनु.,	४३
संभूय वणिजां पण्यं,	याज्ञ.,	५१६
संभूय स्वानि कर्माणि,	मनु.,	३६५
संभूयैकमतिं कृत्वा,	बृह.,	४२६

संमिश्र कारयेत्सीमां,	कात्या., ४४३	स एव तत्र साक्षी स्यात्,	बृह-कात्या., १०१
सम्यक् क्रियापरिज्ञाने,	,, १४५	स एव ता आददीत,	मनु., ३६५
सम्यक् प्रणिहितं चार्थं,	मनु., ८०	स एव ताडयंस्तस्य,	बृह., ५९९
सम्यग्विज्ञानसंपन्ने,	कात्या., ३२	स एव दण्डः स्तेयेऽपि	नार., ५३७
सम्यग्विज्ञाय सद्भावं,	,, ३६	स एव दद्यात्पिण्डं तु,	देव., ७२५
संयतोपस्करा दक्षा,	याज्ञ., ६२०	स एव दायहरः,	विष्णु., ७१६
*संयत्ने दशवाह,	वसि., ७८८	स एव द्विगुणः प्रोक्तः,	कात्या., ४८६
संयोगः क्रियते यस्या,	बृह., ५७७	स एव धर्मजः पुत्रः,	मनु., ६५०
संयोगे विप्रयोगे च,	मनु., ६०१	*स एव बहुश्रुतो,	गौत., ७८३
संरक्षितो दिनस्यान्ते,	कात्या., ५७	स एव विनयं कुर्यात्,	नार., ४९८
संरक्षेत् समयं राजा,	नार., ४२२	स एव साक्षी संदिग्धे,	,, ७६८
*संवत्सरं जडोन्मत्त,	कात्या., ६६	स एव त्वां धारयति,	,, २२८
संवत्सरं वामनस्को	,, ६६	स एवांशस्तु सर्वेषां,	कात्या., ६६३
संवत्सरमुदीक्षेत्,	मनु., ६१५	स एवास्य भवेद्दोषो,	नार., ४३३
संवत्सरामिश्रस्तस्य,	,, ५८९	*स एष द्विपिता,	बौधा., ७२१
संवत्सरेणार्धखिलं,	नार., ४५९	स कानीनः सुतस्तस्य,	ब्रह्मपु., ७२९
संवाद्य रूपसंख्याधीन्,	मनु., ७५५	सकामां दूषयंस्तुल्यो,	मनु., ५९५
संवित्क्रियां विहन्याच्च,	बृह., ४२५	सकामां दूषयानस्तु,	,, ५९५
संविभागक्रयप्राप्तं,	,, १७७	,, ,,	मत्स्यपु., ५९५
संश्रयत्येव तच्छीलं,	मनु., ८२८	सकामायां तु कन्यायां,	नार., ५९६
संश्राव्य मूर्ध्नि तस्यैव,	नार., २२८	सकामास्त्रनु लोमासु,	याज्ञ., ५९६
संसक्तकास्तु सामन्तात्,	कात्या., ४४७	स कालो व्यवहाराणां,	कात्या., ४४
संसर्गचिह्नलोप्त्रै,	बृह., ५१०	सकुल्या बान्धवाः शिष्याः,	बृह., ७५०
संसर्जयन्ति ता ह्येतान्,	बौधा., ५९०	सकुल्यैर्विद्यमानैस्तु,	,, ७४६
संसाधयेत्क्रियां यां तु,	कात्या., ९०	स कृतप्रतिभूश्चैव,	कात्या., ३२५
संसृष्टानां तु यः कश्चित्,	बृह., ७५५	सकृदागर्भाधानात्,	नार., ६४०
संसृष्टानां तु यो भागः,	नार., ७५५	स क्रीतकः सुतस्तस्य,	वासि., ७३२
संसृष्टानां तु संसृष्टा,	कात्या., ७५७	संख्या रश्मिरजो मूला,	बृह., १९९
संसृष्टास्तेन वा त्रे स्युः,	मनु-नार., ७०५	स गृहे गूढ उत्पन्नः,	मनु., ७३०
संसृष्टिनस्तु संसृष्टी,	याज्ञ., ७५६	स गोप्नो निष्कृतिं कार्यो,	बृह., ५००
संसृष्टौ यौ पुनः प्रीत्या,	बृह., ७५५	सङ्ग्रहस्त्रिविधः प्रोक्तः,	व्यास., ५७७
संस्कर्ता च कलामिज्ञः,	बृह., ३७०	स च तां प्रतिपद्येत्,	नार., ६३९
संस्कारस्य विशेषाच्च,	मनु., ८११	स चतुष्पादश्चतुस्थानः,	,, ४०
संस्कृतं येन तत्पण्यं,	कात्या., १०३	*स चान्यान् बिभृ,	विष्णु., ७१६
संस्कृतायां च भार्यायां,	देव., ७१९	स चारके निरोद्धव्यः,	कात्या., ३२६
संस्थितस्यानपत्यस्य,	मनु., ७४५	सचिवाः पत्रपुष्पाणि,	बृह., १०
स एव चन्द्रिका प्रोक्ता,	बृह., ८०८	सचिह्नं ब्राह्मणं कृत्वा	याज्ञ., ५४०

सचिह्नमपि पापं तु,	कात्या., ७९७	सत्यमात्मा-मनुष्यस्य,	नार., १३४
स चेत्तु पथि संरुद्धः	मनु., ५०२	सत्यमेव परं धाम,	,, १२८
स चेन्न कुर्यात्तत्कर्म,	बृह., ४०४	सत्यमेव परो धर्मो,	,, १२८
सचैलं स्नातमाहूय,	विष्णु-याज्ञ., २१३	सत्यवादी समाप्नोति,	व्यास., ८९
सच्छूद्रस्यायमुदितो,	बृह., ४७९	सत्यव्रतः सोपवासः,	बृह., ४४६
स जयी यद्यकोपः स्यात्,	कालि.पु., ७९	सत्यसन्धोऽसि भगवन्,	नार., २२२
स जयेऽवधृते सभ्यैः,	कात्या., ९०	सत्या न भाषा भवति,	मनु-नार., २७०
सजातावाप्नुयात्सर्वं,	देव., ७०२	सत्यानृतविभागस्य,	नार., २३७
सजातानुत्तमो दण्डः,	याज्ञ., ५८६	सत्यानृते च जिह्वायाः,	,, २२८
सज्जयन्ति हि ते नारीः,	मनु., ५८३	सत्यामन्यां सवर्णायां,	याज्ञ., ६१२
स तत्र कारितां वृद्धिं,	कात्या., २८७	सत्या संप्रतिपत्तिस्तु,	बृह., ७०
स तथैव गृहीतव्यो,	मनु., ३४१	सत्यासत्यान्यथास्तौतैः,	याज्ञ., ४७५
स तद्गृहीत्वा निर्गच्छेत्,	नार., ४११	सत्येन पूयते साक्षी,	मनु., १२५
स तयोर्दण्डमाप्नोति,	,, ४९७	सत्येन मामिरक्षस्व,	याज्ञ., २३७
सतस्तत्कालहरणं,	नार-कात्या., १७५	सत्येन वायुः पवते,	नार., १२७
स तस्य दासो भृत्यः स्त्री,	बृह., ३१४	सत्येन शापयेद्विप्रं,	मनु., २५६
स तस्या रक्षणं कुर्यात्,	नार., ६०४	सत्येन श्रावयेद्विप्रं,	नार., १३१
स तां परिगृहाणस्तु,	मत्स्यपु., ५९४	सत्वं हि वर्धते तस्य,	मनु., ५११
स तान् पङ्क्तिषु युञ्जीत,	हारी., ६४६	स दण्डं द्विगुणं चैव,	याज्ञ., २६५
सति राज्ञि समर्थस्य,	व्यास., १८६	स दण्डं प्राप्नुयान्माषं,	मनु., ५३७
*स तु पाणिग्राहस्य,	विष्णु., ७३०	स दण्डमभियोगं तु,	कात्या., २४९
स तु सभ्यैः स्थिरैः,	कात्या., ९	स दण्ड्यः कृष्णलान्यष्टौ,	मनु., ४०४
सत्प्रतिष्ठस्थितो धर्मो,	नार., १०	स दत्त्वा निक्षेप्तां वृद्धिं,	,, ३२८
सत्यंकारं च यो दत्त्वा,	व्यास., ४३३	सदसच्च त्वमेव वरुण,	श. लि., २३८
सत्यंकारकृतं द्रव्यं,	याज्ञ., ४३२	सदानमानसत्कारान्,	याज्ञ., ५६८
सत्यं ब्रह्मनृते त्यक्त्वा,	नार., १३३	स दानमानसत्कारैः,	,, ४२७
सत्यं देवाः समासेन,	,, १२८	स दाप्योऽष्टगुणं दण्डं,	,, १४२
सत्यं देवाः समासेन,	बृह., ३४	सदा प्रहृष्टयाभाव्यम्,	मनु., ६२०
सत्यं धर्मे च संपश्येत्,	मनु., १५	सदृशं प्रीतिसंयुक्तं,	,, ७३१
सत्यं वदोऽरात्मानं,	नार., १३४	सदृशं यं प्रकुर्यातां,	,, ७३४
सत्यं वापि सहान्येन,	व्यास., ७०	सदृशस्त्रीषु जातानां,	मनु., ६६०
सत्यं वाहनशस्त्राणि,	नार., २५६	सदृशानेव तानाहुः,	,, ८१२
,, ,,	बृह., २५६	सदृशी सदृशेनोढा,	बृह., ७४७
सत्यं शौचं बन्धुजनं,	,, ३४०	सदोषं व्याहृतं पित्रा,	कात्या., ३०९
सत्यं साक्ष्ये ब्रुवन् साक्षी,	मनु., १२४	सदोषमपि तत्क्रीतं,	नार., ४३७
सत्यं स्वर्गस्य सोपानं,	नार., १२७	सद्भावं दिव्यदृष्टेन,	कात्या., ९६
सत्यप्रशंसावचनैः	बृह., १२६	सद्भिराचरितं यत्स्यात्,	मनु., २०

सद्यः कृतेषु कार्येषु,	कात्या., ६४	सपालान्वा विपालान्वा,	मनु ४६८
सद्यः कृते सदोषादः,	,, ६५	सपिरडस्याप्रजस्यांशं,	बृह., १७७
सद्यो वा कामजैश्चिह्नैः,	याज्ञ., ५७९	*सपिण्डाभावे,	बौधा., ७५१
सद्यो वैकाहपञ्चाहो,	कात्या., ६५	सपिण्डो वा सगोत्रो वा,	याज्ञ., ६४१
सद्वृत्तभावापितभर्तृकाणां,	अङ्गिरा., ६३३	सपुत्रस्य चाप्यपुत्रस्य,	विष्णु., ३१९
सद्वृत्तानां तु सर्वेषाम्,	कात्या., ७९७	*सप्तजातानजातांश्च,	बौधा., १२९
स द्वौ कार्षापणौ दद्यात्,	मनु., ४५५	*सप्तदशं पुत्रिका,	हारी., ७११
स नाणकपरीक्षी तु,	मनु., ५१५	सप्तधा लौकिकं लेख्यं,	बृह., १५२
स नाभिभिर्बान्धवैश्च,	कात्या., १८९	सप्तमं सोमदैवत्यं,	,, २२४
स निशख्यो विवादः स्यात्,	नार., ९८	सप्त वा पञ्च वा कार्याः,	,, ४२०
स निगृह्य बलाहाप्यो,	कात्या., ३४८	सप्त वित्तागमा धर्म्या,	मनु., ३७६
,, ,	मत्स्यपु., ३४८	सप्तांशं चापविद्धस्तु,	ब्रह्मपु., ७११
स निर्भयो भृशतरम्,	नार., १४०	सप्तागमाद्गृहक्षेत्रात्,	बृह., ३७५
स निर्भाज्य स्वकादंशात्,	मनु., ६६५	सप्ताश्वत्थपर्णान्तरितं,	श. लि., २३०
सन्ततिः स्त्रीपशूनां,	विष्णु., २८९	सप्ताश्वत्थ पत्राणि,	पिता., २२०
सन्ततिस्तु पशुस्त्रीणां,	याज्ञ., २८९	सप्ताहाद्वा द्विसप्ताहात्,	बृह., २४९
सन्तत्यनाशार्थतया,	देव., ६४१	स प्राङ्बिवाकः सामात्यः,	कात्या., ९
सन्तानः पितरश्चैव,	,, ६६०	स प्राप्नुयादमं पूर्वं,	मनु., ५१३
सन्तानकरणं तेषाम्,	बृह., ७३५	सबन्धे भाग आशीतः,	व्यास., २७९
सन्ति ज्ञातार इत्युक्त्वा,	मनु., ८०	सब्रह्मचारिकात्मीय,	याज्ञ., १५५
सन्तुष्टो भार्यया भर्ता,	,, ६१३	*सब्राह्मणान्,	आप., ७७८
सन्तोऽपि न प्रमाणं स्युः,	नार., ११६	समादोषात्तु यज्ञं,	कात्या., ३८
सन्त्यन्यानि पदान्यत्र,	बृह., ४६	सभान्तः साक्षिणः सर्वान्,	मनु., १२४
सन्दिग्धा येन साध्यन्ते,	कात्या., २५९	सभान्तस्थैस्तु वक्तव्यं,	कात्या., १३४
सन्दिग्धेऽर्थेऽभियुक्तानां,	नार., १९७	सभाप्रपादेवगृह,	बृह., ४२३
सन्दिग्धेषु तु कार्येषु,	,, ९८	सभाप्रपापूपशाला,	मनु., ५४३
सन्धिं कृत्वा तु ये चौर्ये,	मनु., ५२७	सभामेव प्रविश्याग्र्यां,	,, २४
सन्धिच्छिदः पान्थमुषो,	बृह., ५०९	सभायां तत्पुनर्जित्वा,	याज्ञ., २६८
सन्धिच्छिदो हतं त्याज्याः,	,, ५२९	सभायां न प्रवेष्टव्यं,	मनु., ३५
सन्धिच्छेत्ताऽनेकविधं,	व्यास., ५२७	सभाराजकुलद्वार,	नार., २१५
सन्नानां द्विगुणो दण्डः,	नार., ४६६	सभासदश्च ये तत्र,	कात्या., १६०
सन्निधातृश्च मोषस्य,	मनु., ५४४	सभासदां प्रसिद्धं यत्,	व्यास., १२०
*सन्निपाते वृत्ते शिश्नच्छेदनं,	आप., ५८६	सभास्थानेषु पूर्वाह्न,	कात्या., ४४
स पणं प्राप्नुयादण्डं,	मत्स्यपु., ५९९	सभिकः कारयेद्द्यूतं,	,, ७६४
सपणश्चेद्विवादः स्यात्,	याज्ञ., २६५	सभिकाधिष्ठितं कार्यं,	बृह., ७६३
स पारयन्नेव शवः,	मनु., ७३४	सभिको ग्राहकस्तस्य,	,, ७६३
सपालः शतदण्डाहो,	,, ४६३	सभ्याः सजयिनो दण्ड्याः,	याज्ञ., २६८

सभ्याधीनः सत्यवादी,	बृह., ३०	समवायेन वणिजां,	याज्ञ., ३५९
सभ्यानां प्राड्विवाकस्य,	कात्या., १६०	समवेतास्तु ये केचित् ,	कात्या., ३५९
सभ्यानां ये विधेयाः स्युः,	,, ३०	समवेतैस्तु यद्दत्तं,	बृह., ३६९
सभ्यश्चास्य न दुष्यन्ति,	नार., ५७४	समवेतैस्तु यत्प्राप्तं,	,, ६६२
सभ्येनावश्यवक्तव्यम् ,	कात्या., ३४	समवेतैस्तु यद्दृष्टम् ,	कात्या., १३७
सभ्यैः संबोधनीयास्तु.,	बृह., १२६	समस्तत्र विभागः स्यात् ,	मनु., ६८२
सभ्यैरेव कृता पश्चात् ,	नार., २६३	,, ,	,, ७०८
स भ्रातृभिर्बहूणीयो,	,, ६६५	,, ,	,, ७५४
समं दद्यात्तत्सुतौ तु,	व्यास., ३०६	समस्ताम् विदिताचारान् ,	नार., १२३
समकालं पश्चिमं वा,	,, १७२	समयस्यानपाकर्म,	,, ४२
समविद्याधिकानां तु,	कात्या., ६७५	समहीमखिलां भुजन् ,	मनु., ६४२
समक्षं जीवतोऽप्यस्य,	नार., १८५	समांश भागाः शेषाः स्युः,	नार., ६६१
समक्षदर्शनात्साक्ष्यं,	मनु., ९८	समांशभागिनस्त्वन्ये,	बृह., ६६२
समक्षमसमक्षं वा,	व्यास., ३५९	समांशा मातरस्तेषां,	,, ६६४
समप्रधनभोक्ता स्यात् ,	ब्रह्मपु., ७१	समाः शत्रौ तु मित्रे च,	नार., २८
समजातिगुणानां च,	बृह., ४७५	समानजातिभिर्वासः,	विष्णु., ८३३
समत्वं साक्षिणां यत्र,	कात्या., ९६	समानयोः समो दण्डो,	बृह., ४७४
समत्वेनैकजातानां,	उशना., ६६२	समामासतदर्धाह,	याज्ञ., ६०
समदण्डास्समृता ह्येते,	कात्या., ५४९	,, ,	,, १५५
समन्यूनाधिकत्वेन,	बृह., ३५६	समारोहति शीघ्रेऽनौ,	व्यास., ६३४
,,	,, ४८३	समावृत्तश्च गुरवे,	नार., ३८३
समन्यूनाधिका भागाः,	,, ६५५	समाहितमतिः पश्येत् ,	,, ९
समन्यूनाधिकैरंशैः,	,, ३६८	समित्पुष्पकुशाधानेष्व,	,, ८०३
समभावे तु देवानां,	पिता., २४५	समीक्ष्य कारिणं प्राज्ञं,	मनु., ७९४
सममंशित्वमाख्यातं,	बृह., ६५२	समीक्ष्य कुलधर्मांश्च,	,, १९
सममिच्छन्ति पिण्डानां,	देव., ६६३	समीक्ष्यमाणो निपुणं,	नार., १२
*सममितरे विभजेरन् ,	वसि., ७००	समीक्ष्य सुधृतः सम्यक् ,	मनु., ७९५
समयस्थानपाकर्म,	नार., ४१९	समुच्छ्रिता ध्वजाकारा,	व्यास., ४४९
*समयादन्यस्य,	गौत., ७३९	समुत्थानव्ययं चासौ ,	कात्या., ४९३
समयेन च गृहीरन् ,	विष्णु., २२०	समुत्थानव्ययं दाप्यः,	मनु., ४९३
समयैः परिगृह्याथ,	नार., २२१	समुत्पन्नाद्धनाद्धं,	बृह., ७५१
समर्थश्चेद्दमं दाप्यो,	बृह., ४०३	समुत्सृजेद्राजमार्गे,	मनु., ४५५
समर्थस्तु हरेर्द्वयंशं,	,, ३७१	समुद्धरेत्तैलघृतात् ,	बृह., २५२
समर्पितोऽर्थिना योऽन्यः	कात्या., ७५	समुद्रपरिवर्तं च,	याज्ञ., ५२२
*समवर्णाक्रोशेन,	विष्णु., ४७५	समुद्रयानकुशला,	मनु., २८३
समवर्णास्तु वा जाताः,	मनु., ७०१	,, ,	,, ४८२
समवर्णोऽपि विभ्रं तु,	कात्या., ३९३	समुद्रेनाप्रुयात्किंचित् ,	,, ३४१

समुद्रेऽपि यदा लेख्ये,  
 समुन्नयेयुः सीमानं,  
 समूलसस्यनाशे तु,  
 समूल्याद्दशभागं तु,  
 समूहकार्य आयातान्,  
 समूहकार्ये प्रहितो,  
 समूहस्थाः प्रवृत्ताश्च,  
 समूहस्थाश्च ये चान्ये,  
 " " "  
 समूह स्थोऽशभागी,  
 समूहानां तु यो धर्मः,  
 समूहो वणिगादीनां,  
 समेऽध्वनि द्वयोर्यत्,  
 समेनिम्नोन्नतानीव,  
 समेषु च गुणोत्कृष्टान्,  
 समेष्वेवं परस्त्रीषु,  
 समैर्हि विषमं यस्तु,  
 समो न्यूनोऽधिको वांशो  
 समोऽपि न च शुद्धः स्यात्,  
 समोऽवकृष्टजातिश्च,  
 समौ कृत्वा नये कुम्भे,  
 सम्यक् च दण्डनं राज्ञः,  
 \*सम्यग्दण्डप्रणयनं,  
 सम्यग्दण्डप्रणेतारो,  
 सम्यग्विचार्य कार्यं तु,  
 स यदि प्रतिपद्येत,  
 \*स यद्येकपुत्रः स्यात्,  
 स याच्यः प्राह्विवाकेन,  
 स राजा पुरुषो दण्डः,  
 स राजांशे स्वके स्थाप्यः,  
 स राजा तच्चतुर्भागं,  
 स राजा नामियोक्तव्यः,  
 सर्पन् सर्पन् शरो याति,  
 सर्पमार्जारनकुलं,  
 सर्वं भूम्यनुते हन्ति,  
 सर्वं वा रिकथजातं तु,  
 सर्व एव विकर्मस्था,

कात्या., १६८  
 नार., ४४४  
 ,, ४६५  
 कात्या., ४३१  
 याज्ञ., ४२७  
 ,, ४२७  
 कात्या., ७९८  
 ,, १०७  
 ,, ८१०  
 कात्या., ४२८  
 ,, ४२२  
 ,, ८१०  
 नार., ५४५  
 महाभा., १९  
 मनु., १४८  
 याज्ञ., ४८६  
 मनु., ५१३  
 बृह., ३५९  
 व्यास., २२३  
 मनु., ३२६  
 बृह., २५४  
 याज्ञ., ७९६  
 विष्णु., ७७९  
 कात्या., ७९७  
 बृह., २५८  
 मनु., ३४७  
 श. लि., ६५४  
 मनु., ३४६  
 ,, ७९४  
 बृह., ७६०  
 मनु., ३३०  
 ,, ३२९  
 पिता., २३५  
 कात्या., ५००  
 मनु-नार., १३३  
 मनु., ६९७  
 ,, ६६६

सर्वकण्डुकपापिष्ठं,  
 सर्वकार्य-वीणाश्च,  
 \*सर्वत्र त्रयाणां,  
 सर्वत्र दायकं राजा,  
 \*सर्वत्र स्वामिनं विनष्टं,  
 सर्वथा च यथा मिथ्या,  
 सर्वयैवात्मनात्मानं,  
 सर्वद्रव्यप्रमाणं तु,  
 सर्वधर्मभ्यो गरीयः,  
 सर्वभक्ष्या च विज्ञेयाः,  
 सर्वभूतप्रसृतिर्हि,  
 सर्वमेवावलम्बन्ते,  
 सर्ववर्णोत्तमां कन्यां,  
 सर्वशास्त्रप्रवीणाश्च,  
 सर्वसाक्ष्येष्वयं धर्मो,  
 सर्वस्वं गृहवर्जं तु,  
 सर्वस्वं च हरेद्राजा,  
 सर्वस्वं तस्य दास्यामि,  
 सर्वस्वं वा निगृह्येतान्,  
 सर्वस्वं हरतः स्त्रीं तु,  
 सर्वस्वं हरतो नारीं,  
 सर्वस्वहरणं कृत्वा,  
 सर्वहरणं दण्डः,  
 सर्वस्वहानिमर्हन्ति,  
 सर्वस्वेऽपि जितेऽभिज्ञे,  
 सर्वान् बलकृतानर्थान्,  
 सर्वापायविनाशोऽपि,  
 सर्वाश्चाण्डलयोन्यस्तु,  
 सर्वासामेकपत्नीनां,  
 सर्वास्तास्तेन पुत्रेण,  
 सर्वास्वापस्तु तान् वर्णान्,  
 सर्वे कांक्षन्ति तां वृत्तिं  
 \*सर्वे च पुरुषपीडाकराः,  
 सर्वे जनाः सदायेन,  
 सर्वे ते गोत्रिणः प्रोक्ताः,  
 सर्वे ते पृथग्दण्ड्याः,  
 सर्वे ते तेन पुत्रेण,

मनु., ५२२  
 बृह., ४२०  
 श. लि., ७८४  
 देव., ७५१  
 विष्णु., ४६७  
 नार., २२८  
 ,, १३४  
 कात्या., २०१  
 गौत., २७  
 हारी., ६४६  
 मनु., ७३७  
 रामा., ६०८  
 कात्या., ५५  
 ,, २८  
 ,, १३६  
 ,, ३७५  
 यम., ७८७  
 कात्या., ३७८  
 ,, ८०१  
 ,, ५२९  
 नार., ५२९  
 याज्ञ., ४२४  
 बृह., ४२३  
 मनु., ७८५  
 कात्या., ७६७  
 मनु., २७१  
 कात्या., ३४३  
 यम., ८१७  
 मनु., ७४०  
 ,, ७४०  
 देव., ७०३  
 बृह., ७०७  
 विष्णु., ४९४  
 कात्या., ४५५  
 हारी., ७१८  
 मनु., ४४६  
 ,, ७४०



सर्वे ते मनुना प्रोक्ताः,  
 \*सर्वेषां करण द्रव्याणि,  
 सर्वेषां धनजातानां,  
 सर्वेषां पापयुक्तानां,  
 \*सर्वेषां लक्षानि,  
 सर्वेषां स्वदारनियमः,  
 सर्वेषामधिको राजा,  
 सर्वेषामपि तन्न्याय्यं,  
 सर्वेषामर्थिनो मुख्याः,  
 सर्वेषामल्पमूल्यानां,  
 \*सर्वेषामेव वत्सो माधं,  
 सर्वेषामेव वर्णानां,  
 ,,  
 सर्वेषामेव सा प्रोक्ता,  
 सर्वेषु सर्वदिव्यं वा,  
 सर्वेषूपनिधिष्वेते,  
 \*सर्वेष्वप्यर्थजातेषु मूल्यं,  
 सर्वेष्वर्थविवादेषु,  
 \*सर्वेष्वे प्रसूतानां तद्धनं,  
 सर्वेष्वेव विवादेषु,  
 सर्वेष्वेवार्थजातेषु,  
 सर्वे सपिण्डास्तद्द्वयं,  
 \*सर्वे हि धर्मयुक्ता भागिनः,  
 सर्वे ह्यनौरसस्येते,  
 सर्वपाः षड्यवो मध्यः,  
 सर्वण्यव्यतिक्रमे द्वादश,  
 सर्वर्णाजोऽप्यगुणवान्,  
 \*सर्वर्णापुत्रान्तरा,  
 \*सर्वर्णापुत्रोऽन्यायवृत्तो,  
 सर्वर्णा भिन्नसंख्या ये,  
 सर्वर्णा भ्रातरो माता,  
 \*सर्वर्णमपूर्वा,  
 सर्वर्णाय सपिण्डाय,  
 \*सर्वर्णयां संस्कृतायां,  
 सर्वर्णासु बहुषु भार्यासु,  
 सर्वर्णासु विधौ धर्मे,  
 सर्वर्णास्त्वसर्वर्णास्तु,

यम., ७१८  
 श. लि., ८००  
 मनु., ६५६  
 कात्या., ८०७  
 देव., ८१२  
 श. लि., ५८३  
 बृह., ३०  
 मनु., ६६६  
 मनु-बृह., २६४  
 नार., ५३६  
 श. लि., ४६५  
 बौधा., ५९०  
 यम., ७८२  
 बृह., ३६०  
 कात्या., २०४  
 ,, ३४८  
 विष्णु., २५५  
 नार., ८३  
 विष्णु., ६८९  
 याज्ञ., ७७१  
 विष्णु., २००  
 बृह., ७५०  
 आप., ६६५  
 देव., ७१६  
 मनु., ८०८  
 श. लि., ४७६  
 बृह., ६६६  
 बौधा., ७०१  
 गौत., ६६५  
 बृह., ६५९  
 देव., ७४९  
 आप., ७१९  
 नार., ६४४  
 बौधा., ७२०  
 विष्णु., ६१२  
 याज्ञ., ६१२  
 कात्या., ७१०

सर्वर्णेभ्यः सर्वर्णास्तु,  
 सर्वर्णे हि द्विजातीनां,  
 सर्वर्णो ब्राह्मणीपुत्रः,  
 सर्वर्णो मागधश्चैव,  
 सश्रद्धिः प्रतिदाप्यः स्यात्,  
 सश्रद्धिकं गृहीत्वा तु,  
 सत्रतानां भृशार्तानां,  
 सशस्त्रोऽनुत्तरीयश्च,  
 सशुद्धस्स्यादन्यथा तु,  
 सशूकस्याव्यसिननः,  
 ससंस्काराश्च पाकाद्याः,  
 ससंस्काराश्च पाकाद्याः,  
 ससभ्यः प्रेक्षको राजा,  
 ससम्यक्पालितो दद्यान्,  
 ससम्यग्भावितः कार्ये,  
 ससहायः स हन्तव्यः,  
 ससाक्षिकं रहोदत्त,  
 ससाक्षिकं लिखेत्पत्रे,  
 \*ससाक्षिकमाप्तं ससाक्षिकमेव,  
 सस्याज्जिवारयेद्वास्तु,  
 सह पिण्डक्रियां कृत्वा,  
 स हरेतैव तद्विक्रयं,  
 सह शय्यासनं चैव,  
 सह सद्भिरतो राजा,  
 सहसा कारयेद्यस्तु,  
 सहसा क्रियते कर्म,  
 सहस्रं क्षत्रियो दण्डयो,  
 सहस्रं ब्राह्मणो दाप्यो,  
 ,, दण्ड्यो,  
 सहस्रं वारुणान् पाशान्,  
 सहस्रस्तूतमो ज्ञेयः,  
 सहासनमभिप्रेक्षुः,  
 सहितो लोकपालैस्त्वं,  
 \*सहि सन्तानाय,  
 \*सहोढः सतमः,  
 सहोढग्रहणात्स्तेयं,  
 सहोढमसहोढं वा,  
 याज्ञ., ८१३  
 मनु-नार., ४७६  
 नार., ८१६  
 नार., ८१६  
 कात्या., ६८६  
 ,, ३००  
 नार., २०७  
 उशना., ४७७  
 बृह., २४४  
 नार., २४५  
 नार., ८२२  
 मनु-विष्णु., ८२२  
 कात्या., ९  
 याज्ञ., ७६५  
 व्यास., १६४  
 मनु., ३४५  
 बृह., ३४०  
 नार., ६३  
 विष्णु., ३३७  
 बृह., ४६६  
 बृ. शां. बृह., ७५४  
 मनु., ७३१  
 नार-मनु., ५७९  
 नार., १०  
 बृह., ५८५  
 नार., ५५६  
 मनु., ५९१  
 ,, ५८८  
 ,, ५८८  
 नार., १२७  
 ,, ८०७  
 मनु-नार., ४९१  
 पितामह, २१९  
 वसि., ७३१  
 विष्णु., ७३०  
 नार., ५४३  
 कात्या., ५४१

सहोढान् विमृशेच्चौरान् ,	नार.,	५४३	साक्षिविप्रतिपत्तौ तु,	नार.,	१४८
सहोढान् सोपकरणान् ,	,,	५४१	साक्षिभूभयतः सत्सु,	याज्ञ.,	८८
साक्षताभिः सपुष्पाभिः,	,,	३९३	साक्षिसम्भयविकल्पस्तु,	बृह.,	८५
साक्षिणः श्रावयेद्वादी,	याज्ञ.,	१२७	साक्षिसम्भयावसन्नानां,	नार.,	२६७
*साक्षिणः सत्येन पूयन्ते, वसि, विष्णु,	,,	१४६	साक्षीदुष्टश्रुतादन्यत् ,	मनु.,	१४५
साक्षिणाः सञ्जिरोद्धव्या,	बृह.,	१४४	साक्षी द्वादशभेदस्तु,	बृह.,	९२
साक्षिणः साधनं प्रोक्तं,	कात्या.,	९३	साक्षी वा साक्षिणान्येन,	व्यास.,	१५६
*साक्षिणः स्वर्णरजत,	श. लि.,	१३०	साक्षी साक्ष्यं न चेद्ब्रूयात् ,	कात्या.,	१४४
साक्षिणश्च स्वहस्तेन,	याज्ञ.,	१५५	साक्षी साक्ष्यसमुद्देशे.	नार.,	१२७
साक्षिणश्चान्यथाब्रूयुः,	बृह.,	५२६	साक्षिपं निष्टुरं ज्ञेयम् ,	नार.,	४७२
*साक्षिणश्चाहूय आदित्योदये,	विष्णु.,	१२३	साक्ष्याभावे तु चत्वारः,	मनु.,	४४२
साक्षिणस्तु समुद्दिश्य,	बृह.,	८३	साक्ष्याभावे द्वयोर्ग्रन्थ,	व्यास.,	४४९
साक्षिणां दूषणं ग्राह्यं,	व्यास.,	१२०	साक्ष्याभावे प्रणिधिभिः,	मनु.,	३४६
साक्षिणामपि यः साक्ष्यं,	व्यास.,	१००	साक्ष्येऽनुत्तं वदन् साक्षी,	,,	१२५
साक्षिणामेव निर्दिष्टः,	बृह.,	१५२	सागमेन तु भोगेन,	विष्णु-कात्या.,	१७८
साक्षिणोऽर्थिसमुद्दिष्टान् ,	बृह.,	१२०	सागमो दीर्घकालश्च,	बृह.,	१८१
साक्षिणो लिखितं भुक्तिः,	कात्या.,	९२	सा चेद्गौर्यसप्तं गच्छेत् ,	नार.,	४१५
साक्षित्वं प्राप्तिभाव्यं च,	नार.,	३०३	सा तु संप्रतिपत्तिस्तु,	बृह.,	६९
,,	,,	७५८	सा त्वीन्मासान्परित्याज्या,	मनु.,	६१५
साक्षिद्वैधे प्रभुतास्स्युः,	बृह.,	१४८	साधनाङ्गान्विता रात्रौ,	व्यास.,	५०९
साक्षिदोषाः प्रयोक्तव्याः,	व्यास.,	१२१	साधयेत्तत्पुनः साध्यं,	कात्या.,	२१३
साक्षिदोषाद्भवेदुष्टम्,	कात्या.,	१६३	साधारणं समाश्रित्य,	व्यास.,	६८३
साक्षिधर्मे विशेषेण,	नार.,	१२८	साधारणः समस्तानां,	नार.,	२०४
साक्षिप्रत्यय एव स्यात् ,	मनु.,	४४२	साधारणः समस्तानां,	बृह.,	६९६
साक्षिप्रत्ययसिद्धानि	,,	७६९	साधारणस्यापलापी,	याज्ञ.,	५६१
साक्षिभिन्नस्तत्क्षणेन,	बृह.,	८३	साधितं प्रतिभूदाप्यः,	कात्या.,	३०५
साक्षिभिर्गदितैः सम्भ्यैः,	,,	१२१	साधुर्कर्मक्रियायुक्ताः,	बृह.,	२७
साक्षिभिर्भावितेनैव,	कात्या.,	३०८	साधून्समानयेद्वाजा,	याज्ञ.,	५६८
साक्षिभिर्भाषितं वाक्यं,	,,	१३८	साध्यं प्रमाणं द्रव्यं च,	कात्या.,	६०
साक्षिमिलिखितेनाथ,	पितामह.,	९३	साध्यप्रमाणहीनश्च,	,,	६१
साक्षिभिस्तावदेवासौ,	कात्या.,	३१०	साध्यमानश्चेद्वाजानं,	विष्णु.,	३३०
साक्षिमच्च भवेद्यद्वा,	याज्ञ.,	३३७	साध्यमानो नृपं गच्छेत् ,	याज्ञ.,	३२९
साक्षिमत्कारणं तत्त,	नार.,	११५	साध्यमूलस्तु यो वादो,	कात्या.,	४०
साक्षिलेख्यककर्तारः,	कात्या.,	१६५	साध्याचारा च तिष्ठेत् ,	,,	६३८
साक्षिलेख्यानुमानं च,	बृह.,	९१	साध्वीनामेव नारीणां,	अङ्गिरा,	६३३
साक्षिलेख्यानुमानेन,	बृह.,	८०५	*साध्व्यां स्वयमुप्ता,	हारी.,	७१३
साक्षिवत्पुण्यपापेभ्यो,	याज्ञ.,	२२९	सान्त्वेन प्रशमय्यादौ,	मनु.,	३२

साग्निध्येऽपि पितुः पुत्रैः,	बृह., ३१२	साहसं पञ्चधा प्रोक्तं,	बृह., ५७१
सा न्याय्या न तु पूर्वापि,	कात्या., ९२	साहसन्यायवज्यानि,	,, ३०
सान्वयस्त्वपहारो यः,	,, ५०५	साहसस्तेयपारुष्य,	बृह-कात्या., ६७
सा पत्नी या विजानाति,	दक्ष., ६१४	,,	याज्ञ., ६६
सापत्न्यास्तैर्विभक्तव्यं,	बृह., ६५९	साहसात्यधिके चैव,	कात्या., ११८
सापदेशं हरेत्कालं,	नार., ८२	साहसी भेदकारी च,	,, ४२५
सा भर्तृलोकमवाप्नोति,	मनु., ६२९	साहसे दृष्टदोषश्च,	याज्ञ., ११२
सामर्थ्यं चानुबन्धं च,	बृह-कात्या., ५७३	साहसेषु तु सर्वेषु,	मनु-नार., ११७
सामन्तकुलिकादीनां,	याज्ञ., ५६०	साहसेषु य एवोक्तः,	नार., ५३७
सामन्तप्रत्ययो ज्ञेयः,	मनु., ४५२	साहसेष्वमिशापे च,	नार., ६७
सामन्तभावात्सामन्तैः	कात्या., ४४३	साहसेष्वमिशापेषु,	बृह., २५६
सामन्ताः साधनं पूर्वं,	,, ४४३	सा हित्वा सर्वपापानि,	हारी., ६३६
सामन्तानामभावे तु,	मनु., ४४४	सिकतेष्टकगोवाल,	बृह., ४४१
सामन्तानुमतं देयं,	नार., ४६७	सिद्धिरस्योभयस्यापि,	व्यास., ३००
सामन्तानुमता सीमा,	व्यास., ४४९	सिद्धेनार्थेन संयोज्यः,	कात्या., २६६
सामन्ता वा समग्रामाः,	याज्ञ., ४४२	सिध्यते वाचिकोऽप्याधिः,	मरीचि., १५२
सामन्तश्चेन्मृषा ब्रूयुः,	मनु., ४४६	सीदन्ति हि प्रमाणानि,	नार-कात्या., ९७
*सामयाचारिकेषु,	गौत., ७८३	सीमन्तोच्चयनादीनि,	यम., ६४१
सामाद्युपायसाध्यत्वात्,	नार., ४१	सीमां प्रति समुत्पन्ने,	मनु., ४३९
सामान्यं चेद्भाषयति,	बृह., ७०७	सीमाज्ञाने तृणां वीक्ष्य,	,, ४४०
सामान्यं पुत्रकन्यानां,	देव., ६९१	*सीमामेत्तारमुत्तमसाहसं,	विष्णु., ४५६
सामान्यं पुत्रदारादि,	बृह., ३७३	सीमामध्ये तु जातानां,	कात्या., ४५६
सामान्यं याचितं न्यासः,	दक्ष., ३७४	सीमायामविषहत्यायां,	मनु., ४५०
सामान्यद्रव्यप्रसभ,	याज्ञ., ५५८	सीमाविचारधर्मश्च,	,, ४३
सामान्यमस्वतन्त्रत्वं,	नार., ३८३	सीमाविनिर्णयं कुर्युः,	,, ४४२
सामान्यार्थसमुत्थाने,	याज्ञ., ६६२	सीमाविवादे निर्णीते,	कात्या., १७१
*सामुद्रशुल्कः,	दौधा., ५१९	सीमाविवादैर्निवृत्ते,	,, १५३
साम्राज्यकृत्सजात्येषु,	मनु., ६७०	सीमावृक्षांश्च कुर्वीरन्	मनु., ४३९
सा यथाकाममश्रीयात्,	नार., ६८४	सीमासन्धिषु कार्याणि,	,, ४४०
सारभूतं पदं मुक्त्वा	कात्या., ९०	सुकृतं यस्त्वया किञ्चित्,	याज्ञ., १३५
सारस्तु व्यवहाराणां,	नार., ९१	सुकृतैः शापिताः स्वैः स्वैः,	मनु., ४४५
साऽरुन्धतीसमाचारा,	अङ्गिरा., ६३२	सुखस्य नित्यं दातेह,	,, ६२७
,,	कात्या., ६३८	सुखार्थं या प्रवृत्ता स्त्री,	कात्या., ६४६
सावधारणकं चैव,	बृहवसि., १५९	सुखेषु सक्तो नृपतिः,	महाभा., १७
साशङ्का बालभावे तु,	दक्ष., ६०६	सुनिह्वैरव विज्ञायाः,	व्यास., ५०७
साशीतिपणसाहस्रो,	याज्ञ., ८०७	सुतप्ते निक्षिपेत्तत्र,	पिता., २५२
साहसं च भवेदेवं,	कात्या., ५०५	सुतस्य सुतदाराणां,	कात्या., २७६

सुताश्वेषां प्रभर्तव्या,	याज्ञ., ६६७	सूत्रकार्पासविल्वानां,	मनु., ५३५
सुदीर्घस्यापि कालस्य,	मनु., ४०४	सेतुं प्रवर्तयेत् कश्चित्,	नार., ४५८
सुदीर्घेणापि कालेन,	नार., १०३	सेतुकेदारमर्यादा,	„ ४३८
„ „	„ १०४	सेतुमेदकरं वाप्सु,	याज्ञ., ५६७
„ „	बृह., १८९	*सेतुमेदकृतश्च हन्यात्,	विष्णु., ५६६
सुप्तमत्तप्रमत्तांश्च,	नार., ५०९	सेतुस्तु द्विविधः प्रोक्तः,	नार., ४५८
सुप्तमत्तप्रमत्तेषु,	„ ५०६	सेनायां सैनिकानां तु,	बृह., ३०
सुप्रतप्तं सुसंयुक्तं,	„ २३०	सेवासौर्यादिना तुष्टः,	„ १५९
सुवीजं त्वेव सुक्षेत्रे,	मनु., ८२४	सेह कीर्तिमवाप्नोति,	याज्ञ., ६२९
सुभृतापि कृता नित्यं,	दक्ष., ६०६	सेह निन्दामवाप्नोति,	मनु., ६३७
*सुरालशुनपलाण्डु,	श. लि., ६३०	सैरिन्ध्रं वागुरावृत्तिं,	मनु-विष्णु., ८२१
सुवर्णं तु भवेद्दण्डः,	मत्स्यपु., ६००	सोऽज्येष्ठः स्यादभागी च,	मनु., ६६०
सुवर्णरजतादीनां,	नार., ५३३	सोत्तरो नोत्तरश्चैव,	नार., ४०
„	मनु., ५३३	सोत्तरोऽभ्यधिको यत्र,	नार., ४०
*सुवर्णरत्नापहरणे,	श. लि., ५३०	सोदर्या विभजेरंस्तं,	मनु., ७५५
सुवर्णशतमेकं तु,	कात्या., ८०१	सोऽधिकर्मकरो ज्ञेयः,	नार., ३८६
*सुवर्णार्धो,	विष्णु., २०१	सोऽनिबद्धः प्रयोक्तव्यः,	कात्या., ३२६
सुवर्णेषु क्षयो नास्ति,	नार., ५२४	सोऽनुज्ञातो हरेदंशान्,	मनु., ७०४
सुश्लिष्टदेशमासु जितेन्द्रियासु,	विष्णु., ६२१	सोऽन्तर्दशाहातद्रव्यं,	„ ४३०
सुसंस्कृते तु षष्ठं स्यात्,	व्यास., ४६१	सोऽपत्यं ध्रातुरुत्पाद्य,	मनु., ७०९
सुसंस्कृतोपस्करया,	मनु., ६२०	सोपवासः सूर्यग्रहे,	बृह., २५१
सुहृत्सम्बन्धिसंदिष्टैः,	बृह., ३२५	सोऽपितद्विगुणं दाप्यः,	नार., ४३२
सुहृद्वन्धुसकुल्यस्य,	„ १८९	सोऽपि दत्तं हरेत् पित्रा,	महाभा., ६९८
सूक्ष्मत्वात्साक्षिधर्मस्य,	नार., ११४	सोऽपि यत्नेन संरक्ष्यो,	याज्ञ., ४२२
सूक्ष्मेभ्योऽपि प्रसङ्गेभ्यो,	बृह., ६०३	सोऽपि वित्तं हरेत्पित्रोः,	महाभा., ६९८
सूक्ष्मो हि भगवान् धर्मः,	नार., १४	सोऽमिधेयो जितः पूर्वं,	बृह., ६९
सूतके मृतके वापि,	ब्रह्मपु., ७३६	सोमाय राज्ञे सत्कृत्य,	श. लि., ७२६
सूतमागधचण्डाल,	यम., ८१७	सोऽविशुद्धः सुविज्ञेयः,	नार., २३२
*सूतमागधचण्डालाः,	पैठीन., ८१८	सोऽस्मिन्लोके यशः प्राप्य,	बृह., २६०
*सूतमागधचण्डालाश्चेति,	„ ८१८	सोऽस्य कार्याणि संपश्येत्,	मनु., २४
सूतायाः प्रतिलोमास्तु,	नार., ८२२	सोऽस्या दद्यादणं भर्तुः,	नार., ३२३
„ „	मनु-विष्णु., ८२२	सौदायकं कमायातं,	बृह., ३७६
*सूतानामन्नसंस्कार,	श. लि., ८३०	सौदायकं धनं स्त्रीणां,	कात्या., ६८४
सूतानामश्वसारथ्यं,	मनु., ८२९	सौदायिके सदा स्त्रीणां,	„ ६८४
„ „	यम., ८३१	सौभाग्यवदवैधव्यं,	„ ६२६
सूतो वैदेहिकश्चैव,	मनु-विष्णु., ८२१	सौराक्षिकं वृथादानं,	बृह., ३१६
सूत्रकार्पासगोमय,	विष्णु., ५३६	स्कन्धौदादाय तस्यासा,	नार., ३९२

*स्तुतिक्रिया,	विष्णु., ८३१	स्त्रीपुंगोऽश्वपशुस्तेयी,	व्यास., ५१०
स्तेनसाहसिकोद्भूत,	कात्या., ३८१	स्त्रीपुंघर्मो विभागश्च,	मनु., ४३
स्तेनाः सर्व एवापहृतं,	विष्णु., ५४०	स्त्रीपुंसयोग इत्येतत्,	नार., ६०१
स्तेनाः सुरापा ब्रह्मन्नाः,	यम., ७८६	स्त्रीपुंसयोर्निगूढायां,	,, ६१६
स्तेनानां निग्रहादस्थ,	मनु., ५११	स्त्रीपुंसयोश्च संबन्धो,	,, ४२
स्तेनानां पापबुद्धीनाम्,	,, ५११	स्त्रीपुंसवर्तनोपायः,	बृह., ६०१
*स्तेनोऽनुप्रवेशान्न दुष्यति,	गौत., ५४२	स्त्रीपुंसौ वञ्चयन्तीह,	व्यास., ५२१
स्तेयं च साहसं चैव,	मनु., ४३	स्त्रीपुंसौ हेमरत्नानि,	बृह., ५५७
स्तेयपारुष्ययोश्चैव,	कात्या., ११६	स्त्रीपुंसौ यत्समेयातां,	नार., ५७७
स्तेयसाहसयोर्दिव्यं,	कात्या., १९९	स्त्री प्रसूताऽप्रसूता वा,	,, ६४५
स्तेयस्याथ प्रवक्ष्यामि,	मनु., ५०५	स्त्रीबालकान् वञ्चयन्ति,	बृह., ५२३
स्तेये तु श्वपदं कार्यं,	,, ७८४	स्त्रीबालब्रह्मणध्नांश्च,	मनु., ५७०
स्तेये तु श्वपदं कृत्वा,	नार., ७८६	*स्त्रीबालवृद्धाः,	श. लि., ७८०
स्तोभाद्विना ह्युषित्वा तु,	,, ४११	स्त्रीबालभ्युपपत्तौ च,	मनु., ८३३
स्तोमवाहीनि भाण्डानि,	,, ४१२	स्त्रीबालार्तान् लिप्यविज्ञान्,	बृह., १६६
स्त्रियं स्पृशेददेशेयः,	नार-मनु., ५७९	स्त्रीबालोन्मत्तवृद्धानां,	मनु., ७२
स्त्रियमसत्कभर्तृकां,	विष्णु., ५९३	स्त्रीबुद्धेरस्थिरत्वात्,	,, ११८
स्त्रियां तु रोचमानायां,	मनु., ६१३	स्त्रीभिर्भर्तृवचः कार्यं,	याज्ञ., ६२८
स्त्रियाः श्रुतौ वा शस्त्रे वा,	यम., ६३८	*स्त्रीरक्षातज्जीवनं च,	विष्णु., ८३१
स्त्रिया वा संभवे कार्यम्,	मनु., ११७	स्त्रीशुल्कानुग्रहार्थं च,	नार., ३७४
स्त्रियास्तु यद्भवेद्विज्ञम्,	,, ६८९	स्त्रीशुल्केषु न वृद्धिः स्यात्,	कात्या., २९१
*स्त्रियो गृहदेवताः,	पैठीन., ६२७	स्त्रीषु रात्रौ बहिर्गमात्,	नार., २७०
स्त्रीकृतान्यप्रमाणानि,	नार., २७३	स्त्रीषु वृत्तोपभोगः स्यात्,	कात्या., ५८५
स्त्रीज्ञाति स्वाम्यनुज्ञातम्,	बृह., ३७६	स्त्रीवृद्धबालकितव,	याज्ञ., ११२
स्त्रीणां न तु भवेद्विव्यम्,	नार., २०७	स्त्रीष्वनन्तरजातासु,	मनु., ८१२
स्त्रीणां शीलाभियोगे च,	,, ९५	स्त्रीहर्ता लोहशयने,	व्यास., ५२८
स्त्रीणां साक्ष्यं स्त्रियः कुर्युः,	मनु-कात्या., १०७	स्थलनिम्ननदीस्रोत,	बृह., ४४०
स्त्रीणां सौभाग्यतो ज्यैष्ठ्यम्,	कात्या., ६१२	स्थानं गृहं गृहस्थत्वं,	,, ३४०
स्त्रीद्रव्यवृत्तिकामो वा,	याज्ञ., ५७५	स्थानं वंशानुपूर्वी च,	व्यास., १५७
*स्त्रीधनं च कन्या,	श. लि., ७२६	स्थानदोषः कालकृतः,	नार., ५२
स्त्रीधनं दापयेद्दण्डम्,	कात्या., ८०३	स्थानभ्रष्टास्त्वपङ्क्तिस्थाः,	कात्या., १६४
*स्त्रीधनं दुहितृणाम्,	गौत., ६८९	स्थानलाभनिमित्तं यत्,	नार., २७७
स्त्रीधनं स्यादपत्यानाम्,	बृह., ६८८	स्थानात्स्थानान्तरं गच्छेत्,	नार., १४०
स्त्रीधनभ्रष्टसर्वस्वाम्,	नार., ६१६	स्थानाद्वान्यत्र गमनात्,	पिता-नार., २३९
स्त्रीधनस्येति धर्मोऽयम्,	कात्या., ६९०	स्थानान्येतानि दण्डस्य,	बृह., ७८२
स्त्री नानुक्ता बहिर्निष्क्रामेत्,	श. लि., ६२२	स्थानासेधः कालकृतः,	नार., ५२
स्त्री निषेधे शतं दण्ड्या,	याज्ञ., ५८३	स्थानेषु धर्मजुष्टेषु,	कात्या., ६८७

स्थापयन्ति तु यां वृद्धिम्,  
स्थापयेदासने तस्मिन्,  
स्थापितं येन विधिना,  
स्थापितां चैव मर्यादाम्,  
स्थाप्यतेऽन्यगृहे द्रव्यम्,  
स्थायिनामेष नियमो,  
स्थावरं सिद्धिमाप्नोति,  
स्थावरस्य क्षयं दाप्यो,  
स्थावरस्यैतदाख्यातम्,  
स्थावरे विक्रियाधाने,

”  
स्थावरे षट्प्रकारेऽपि,  
स्थावरेषु विचारेषु,  
स्थावरेषु विवादेषु,  
स्थिते राजनि तद्धर्मे,  
स्थित्यैतत् स्थापयेद्राजा,  
स्थित्वैकस्मिन्स्ततोऽन्यानि,  
स्थिरा पञ्चविधा सीमा,  
स्थिरे तोये निमज्जेतु,  
स्थूलसूत्रवतामेषां,  
स्नानोदकेन संमिश्रान्,  
स्नेहात्क्रोधाज्जोभतो वा,  
स्नेहादज्ञानतो वापि,  
स्नेहेन तु चिरं भुक्त्वा,  
स्पर्शो भूषणवस्त्राणाम्,  
स्मरत्येवं प्रयुक्तस्य,  
स्मार्ते काले क्रिया भूमेः,  
स्मर्यते च मुहुर्यश्च,  
स्मृतिमत्साक्षिसाम्यं तु,  
स्मृतिर्विनिर्णयं ब्रूते,  
स्मृतिशास्त्रं तु यत्किञ्चित्,  
स्मृत्यपेक्षं हि साक्षित्वात्,  
स्मृत्याचारव्यपेतेन,  
स्मृत्योर्विरोधे न्यायस्तु,  
स्यात्साहसं त्वन्वयवत्,

” ”  
स्वं दासमिच्छेयः कर्तुम्,

मनु., २८३  
” २४  
बृह., ३४१  
वृद्धमनु., ४५६  
बृह., ३३८  
नार., ४२९  
बृह., १७७  
नार., ४२९  
बृह., १९२  
मरीचि., १५२  
व्यास., १६४  
कात्या., ४४३  
” ६०  
पितामह., ९३  
श. लि., ७७६  
कात्या., २६०  
नार., २३०  
व्यास., ४४८  
पिता., २३६  
नार., ५२५  
पिता., २५०  
बृह., २१२  
कात्या., ३८  
व्यास., ४११  
बृह., ५७८  
कात्या., १५६  
” १७९  
बृह., १००  
नार., ११४  
बृह., २७  
कात्या., २५९  
नार., १०४  
याज्ञ., ४५  
” १३  
मनु., ५०५  
” ५५७  
नार., ३९३

स्वं द्रव्यं यत् विश्रम्भान्,  
स्वं लभेतान्यविक्रीतम्,  
” ”  
स्वं शिल्पमिच्छान्नाहर्तुम्,  
स्वकदापि चित्ताद्धि,  
स्वकाम्ये वर्तमाना सा,  
स्वकुटुम्बाविरोधेन,  
स्वकुलं पृष्ठतः कृत्वा,  
” ”  
स्वचर्यावसितानां तु,  
स्वच्छन्दगा तु या नारी,  
स्वच्छन्दविधवागामी,  
स्वच्छन्दव्यमिचारिण्याम्,  
स्वच्छन्दगा धनुजला,  
स्वजातिजानन्तरजाः,  
\*स्वजातिजीवनं,  
स्वज्ञानशंसनाद्वादात्,  
स्वतन्त्रस्तत्र तु गृही,  
स्वतन्त्रता गृहे यस्य,  
स्वतन्त्रस्यात्मनो दानात्,  
स्वतन्त्राः सर्व एवैते,  
स्वतन्त्रोऽपि हि यत्कार्यम्,  
स्वातन्त्र्याद्विप्रणश्यन्ति,  
स्वदारांस्यजतो मोहात्,  
स्वदासीं यस्तु संगच्छेत्,  
स्वदेशघातिनो ये स्युः,  
स्वदेशपण्यात् शुल्कांशम्,  
स्वदेशपण्ये तु शतम्,  
स्वदेशस्थोऽपि वा यस्तु,  
स्वदेशे यस्य यत्किञ्चित्,  
स्वदेशे वा विदेशे वा,  
” ”  
स्वधनं च स्थिरीकृत्य,  
\*स्वधनादेव तद्द्यात्,  
स्वधर्मं हि प्रयत्नेन,  
\*स्वधर्ममपालयन्,  
स्वधर्मत्यागिनोऽन्यत्र,

नार., ३३८  
याज्ञ., ३५३  
” ३५५  
नार., ३८४  
मनु., ६८३  
दक्ष., ६०६  
याज्ञ., ३७४  
यम., ७१८  
हारी., ७१८  
नार., २६७  
यम., ६१८  
याज्ञ., ७६०  
यम., ६१८  
व्यास., ४४९  
मनु., ८२४  
देव., ८३४  
कात्या., ६७७  
नार., २७४  
” २७४  
कात्या., ३९६  
नारद., २७५  
नार., २७२  
” ६०२  
देव., ६१६  
कात्या., ३९२  
नार-कात्या., ५२८  
विष्णु., ५१८  
याज्ञ., ५१७  
कात्या., २८७  
” ५५३  
बृह., २७६  
मनु., ३१४  
बृह., ३२९  
मनु., ३०६  
” ६०३  
विष्णु., ७७९  
नार., ३९६

स्वधर्माचलितान् राजा,	याज्ञ.,	७७५	स्वसाद्ये न नियोज्याः स्युः,	बृह.,	३०७
स्वधर्मेण नियुक्तायाम्,	मनु.,	७२१	स्वसीम्नि दद्याद्ग्रामस्तु,	याज्ञ.,	५५२
स्वधर्मेणैव कार्याणाम्,	कात्या.,	३१	स्वस्थेनार्तेन वा देयम्,	कात्या.,	३७
*स्वनिहिताद्राज्ञे,	विष्णु.,	७९१	स्वहस्तकालसंपन्नम्,	याज्ञ.,	१५८
*स्वपितृवित्तानु,	,,	८३३	स्वहस्तलिखितमसाक्षिकम्,	विष्णु.,	१५४
स्वप्रोऽन्यगेहवासश्च,	मनु.,	६२३	स्वहस्तकाजःनपदम्,	व्यास.,	१७१
स्वभागान्यदि दद्युस्ते,	नार.,	७६०	स्वहस्तेनापि रोद्धव्यो,	कात्या.,	५३
स्वभावाद्विकृतं गच्छेत्,	याज्ञ.,	७८	स्वां प्रसूतिं चरितं च,	मनु.,	६०३
स्वभावोक्तं वचस्तेषां,	कात्या.,	१३७	स्वा चैव कुर्यात् सर्वेषाम्,	,,	६११
स्वमप्यर्थं तथा नष्टं,	नार.,	७९१	स्वात्स्वादंशाच्चतुर्भागम्,	,,	६७१
स्वयं कार्याणि कुर्वीत,	कात्या.,	४६	स्वानि कर्माणि कुर्वाणा,	,,	१९
स्वयं कृतं वा यष्टुं,	याज्ञ.,	३१८	स्वामिदत्तां तु गृणीयात्,	कात्या.,	६४७
स्वयं चोपागतः पुत्राः,	नार.,	७१५	स्वामिदोषादकरणे,	नार.,	४०५
स्वयं दत्तं निषादं च,	बौधा.,	७१५	स्वामिनं तु विजानीयात्,	कात्या.,	४५७
स्वयं दत्तश्च शौद्रश्च,	मनु.,	७१६	स्वामिनां च पशूनां च,	मनु.,	४१८
*स्वयं शुल्कं वोढा,	श. लि.,	६९२	स्वामिना नृपतिर्विभ्रं,	कात्या.,	१९४
स्वयमभ्युपपन्नश्च,	नार.,	८१	स्वामिने तत्समं दाप्यो,	व्यास.,	५३७
स्वयमभ्युपपन्नोऽपि,	,,	२६३	स्वामिने तद्धनं दाप्यः,	बृह.,	५४०
*स्वयमर्जितमवैधेभ्यो,	गौत.,	६७५	स्वामिने नार्पयेद्यावत्,	कात्या.,	४११
स्वयमीदितलब्धं च,	मनु-विष्णु.,	६७६	स्वामिने योऽनिर्वैद्यैव,	याज्ञ.,	४५७
स्वयमुक्तः स शास्त्रेषु,	नार.,	११४	स्वामिने स सदं दाप्यो,	व्यास.,	४६१
स्वयमुक्तिरनिर्दिष्टः,	,,	१०८	स्वामिप्राणप्रदो भक्तः,	याज्ञ.,	३९२
*स्वयमुत्पादित,	वसि.,	७१८	स्वामी तु विवदेद्यत्,	कात्या.,	४६९
स्वयमुत्पादितश्चैको,	यम.,	७१४	स्वामी दत्त्वार्धमूल्यं तु,	बृह.,	३५६
स्वयमेव तु यो दद्यात्,	मनु.,	३४२	स्वामी सतापि लेख्येन,	,,	१८८
स्वयमेवागतायां तु,	कात्या.,	५८२	स्वामी सददमं दाप्यः,	,,	४६६
स्वरभेदश्च दुष्टस्य,	,,	७८	स्वाम्यं च न स्यात् कस्मिंश्चित्,	मनु.,	७९५
स्वरवर्णेज्जिताकारैः	मनु.,	७७	स्वाम्यं विभावयेदन्यैः,	बृह.,	३६२
स्वर्गं गच्छत्यपुत्रापि,	,,	६३७	*स्वाम्यमात्यदुर्गकोश,	विष्णु.,	५७०
*स्वर्गः सत्यवचने,	गौत.,	१४५	स्वाम्यर्थे जीवितं त्यक्त्वा,	कात्या.,	६७८
स्वर्गातस्य ह्यपुत्रस्य,	याज्ञ.,	७५०	स्वाम्याज्ञया तु यच्चौरैः,	बृह.,	३७१
स्वलेखनाद्वा लभते,	नार.,	६२	स्वार्थसिद्धौ प्रदुष्टेषु,	कात्या.,	४४३
स्वल्पेन वा संविभज्य,	श. लि.,	६५३	स्वालक्षण्य परीक्षार्थम्,	मनु.,	६०५
स्वल्पेनापि च यत्कर्म,	कात्या.,	३४९	स्वे क्षेत्रे संस्कृतायां तु,	,,	७१९
स्वल्पेऽपराधे देवानाम्,	,,	२४६	स्वेच्छया यः प्रतिश्रुत्य,	कात्या.,	३७७
स्वल्पेऽपराधे वागदण्डम्,	बृह.,	७८१	स्वेच्छाकृतविभागो यः,	बृह.,	७६०
स्ववाक्प्रतिपन्नश्च,	,,	८३	स्वेच्छानुपमुषो दारान्,	नार-कात्या.,	५८२
स्वशरीरेण दण्ड्यास्स्युः,	यम.,	५६७	स्वेच्छादेयं स्वयं प्राप्तम्,	बृह.,	३७५
स्वश्मश्रुनखरोमाणाम्,	,,	६४०	स्वेच्छादेयं हिरण्यं तु,	,,	३६९

स्वेभ्यः स्वेभ्यस्तु कन्याभ्यः,  
स्वे स्वे च योनिर्बन्धान् ,  
स्वैरिणी च पतिं हित्वा,  
स्वैरिणी च पुनर्भू च,  
स्वैरिण्यब्राह्मणी वेश्या,

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हत्वाततायिनं चैव,  
हन्त संदश्यते यत्र,  
हन्ता च घातनीयः स्यात् ,  
हन्ता तदानुमानेन,  
हन्ति जातानजातांश्च,  
हन्यते प्रेक्षमाणानां,  
हन्याच्चित्रैर्वधोपायैः,

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\*हन्यात् प्रसह्य तस्कराणाम् ,  
हरेद्भिन्नाहृद्वापि,  
हर्म्यं देवगृहं वापि,  
हस्तक्षतेषु सर्वेषु,  
हस्तद्वयं निखेयं तु,  
हस्तपाषाणलगुडैः,  
हस्तयोर्निक्षिपेद्यस्य,  
हस्ताङ्घ्रिलिङ्गनयनं,  
हस्तानां तु शते सार्धं,  
हस्ताभ्यां तं समादाय,  
हस्तिपत्रात्यदासेषु,  
हस्त्यश्वगोखरोष्ट्रादीन् ,  
हस्त्यश्वरथहर्तृश्च,  
हानिर्विक्रेतुरेवासौ,  
हानिश्चेत्क्रेतुदोषेण,  
हानिस्तत्र समाकल्या,  
हास्यं परगृहे यानं,  
हिसकोऽन्याङ्गनासेवी,  
हिसन्ति छद्मना नृणां,  
हिसयश्चोरवहाप्यो,  
हिस्युर्धनानि तान् राजा,  
हितेषु चैव लोकस्य,  
हिरण्यं गोशकृद्भान् ,  
हिरण्यमग्निरुदकम् ,  
हिरण्यरत्नकौशेयं,

मनु., ६७१  
देव., ८३३  
याज्ञ., ६४६  
हारी., ६४६  
नार., ५९८  
बृह., ४९७  
,, ५७५  
,, ५५७  
,, ४९५  
मनु-नार., १३३  
मनु., ३७  
,, ७९९  
व्यास., ५७५  
विष्णु., ५४९  
कात्या., ५६६  
बृह., ३७१  
नार., २२६  
,, २१५  
बृह., ४८५  
पिता., २२७  
बृह., ७८२  
पिता., २३५  
नार., २३०  
,, ४९८  
कात्या., ४१२  
मनु., ५३०  
याज्ञ., ४३१  
,, ४३३  
मरीचि., ३५७  
याज्ञ., ६३१  
बृह., ९५  
,, ५२२  
,, ५५७  
,, ७४६  
कात्या., ८०६  
बृह., १३६  
नार., ४२  
,, ५०६

हिरण्यरूप्यसूत्राणां,  
हिरण्यवर्जं लोहं च,  
\*हिरण्यस्य परा वृद्धिः,  
हिरण्ये द्विगुणा वृद्धिः,  
हिरण्ये द्विगुणीभूते,

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हीनं पुरुषकारेण,  
हीनजातिं परीक्षीणं,  
हीनमध्योत्तमत्वं च,  
हीनमध्योत्तमत्वेन,  
हीनमध्योत्तमानां तु,  
हीनमूल्यं च यत्क्रीतं,  
हीनमूल्यमवेलायां,  
हीनवर्णोपभुक्ता या,  
हीनस्य गृह्यते वादो,  
हीनाद्रहो हीनमूल्यात् ,  
हीना न स्याद्विना भर्ता,  
हीनास्तमुपजीवेयुः,  
हीना हीनान् प्रसूयन्ते,  
हीने कर्मणि पञ्चाशत् ,  
हीनेष्वर्धदमो मोहं,  
हीयते हीयमाने तु,  
हीयमानो न शुद्धः स्यात् ,  
हुंकारं कासनं चैव,  
हृतं नष्टं च यल्लब्धम् ,  
हृतं प्रनष्टं यद्द्रव्यम् ,  
हताधिकारां मलिनाम् ,  
हेतिपुष्पफलादीनाम् ,  
हेत्वर्थगतिसामर्थ्यैः,  
हेत्वादिमिर्नपश्येच्चत् ,  
हेमकारादयो यत्र,  
हेमन्ते वा सप्त यवाः,  
हेमप्रमाणयुक्तं तु,  
हेममुक्ताप्रवालाढ्यम् ,  
हेमाग्न्यम्बु दशौ हृच्च,  
हेमाग्न्यम्बुस्वपुरुषाः,  
होता चापि हरेदश्वम् ,  
हृदेषु स्थिरतोयेषु,

बृह., ३७०  
नार., ५०६  
विष्णु., २८९  
बृह., २८९  
,, ३२९  
व्यास., २९८  
मनु-नार., ४१६  
याज्ञ., ३२७  
बृह., ३८५  
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नार., ४८५  
बृह., ३५५  
नार., ३५५  
बृह., ५९४  
,, २६८  
नार., ३५५  
याज्ञ., ६१९  
देव., ७१६  
मनु-विष्णु., ८२१  
कात्या., ५६  
याज्ञ., ४८६  
नार., ४६०  
पिता., २२२  
कात्या., ४७१  
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याज्ञ., ३५७  
,, ६१९  
बृह., २९०  
नार-बृह., ४९६  
कात्या., ४९६  
बृह., ३७०  
नार., २४१  
कात्या., २०१  
बृह., ५२४  
,, २६  
,, २६  
मनु-बृह., ३६६  
नार., २३६